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PRINCIPLES OF LENDING AND RECOVERY

SRIDHARA BABU. N

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PART-I

Deduced from
INDIAN SC & HC JUDGEMENTS

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SOURCE

<http://indiankanoon.org>

&

<http://www.manupatrafast.in>

(Excellent sites for law Research)

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SRIDHARA BABU.N

**THIS WORK IS DEDICATED TO
MY PARENTS**



**Smt Gowramma & Sri H.R. Nagarajachar
MY GURU**



**THE CONTENTS ARE HARD
WORK OF EACH JUDGES
OF HINDUSTAN COURTS**



**USE IT SPREAD IT AND BRING GREATEST
CHANGE IN OUR LEGAL FIELD.**

**LET YOUR CLIENTS BE AWARE OF LAW,
AWARENESS DOES NOT CUT OUR POCKETS,
IT BRINGS ELITE CIVILISATION TO BRING UP
NATION AND SOCIETY**

SRIDHARA BABU.N

FOREWARD BY AUTHOR

Recently i made effort to publish one Kannada book through a publisher, he gave all good assurances and later on influenced by some bad people advice faded to shadow without any communications. I know the present set up of our legal fraternity and politicians. Some people at top don't want anyone from their profession make name through unique work. In 2007 i have started to write in blogs about law. This habit spread to Facebook and later to collection of documents in Scribd. I have not wasted money for doing all these things. But whatever i spent time to read and research is shared freely through blogs and free sites. That is where many bad people started looking at me as their rival/ enemy/ contender/ etc etc. Because they may have misled the people by wrong advice. When people saw my blogs, people may have questioned them. This type of irritation has drawn many type of psychic enmity among them. Of course no one express their such enmity directly, but locally made many efforts to curtail my work. At several times my development is portrayed as effort to enter politics. I have no interest in politics not even in any bar association or bar council elections. I know change cannot be made with present setup. Only way to change is educating people and our young upcoming advocates. So i chosen this way of service.

Many of our advocate brethren, still contact me and discuss with me and give knowledge to me, take knowledge from me. This is what our profession should be. If we stick to a false identity that iam complete, there our death in profession starts. There is a learning process on each day. We learn from seniors, juniors, colleagues, clients and even opponent advocates and clients. No one is complete in the field. Even at several times layman will teach great lesson to us. The learning process should not end in our field. Learning process shall be started from observation, reading, hearing, patience and discussion. But, Argument, questioning and disputing shall be minimized during learning process.

My advocate service is started with straight away questioning the way of arguments made before courts by several advocates. The way of presentation and the way of wasting of court time is in detail questioned by me in a local newspaper in 2001. This has initially made some local advocates enrage on me. But i have not taken back from that article. That article in Kannada can be viewed in <http://sbn-kannada.blogspot.com/> Later my writing in such local paper curtailed by some vested interests. For four years many articles were suppressed by that newspaper. At that time i have not kept copy of such handwritten articles. Later some other weekly tabloids published my articles. Still there also some elements suppressed my growth. Later in 2007 i selected google

blogs to write in my views. And later jumped to research using indian kannon dot org.

That gave me immense pleasure and satisfaction in my work. On the same way i shared many contents in the blog and several online free sites. I don't wanted any capitalization of my service, neither iam interested in any monetary gain. But god has given me all resources and help in all times. Some clients, colleagues, juniors, betrayed me on times, but almighty God has not betrayed me he has thought great lessons from trials and gave blessing in disguise at the needy times. Some got out of my touch many real friends stood with me in hard times.

My advocate service is entangled with enmity for questioning some local politicians of their illegality and for taking cases against them. This occasion is badly utilized by communist mentality people and shrewd persons. They made much efforts to mislead me and suppress my profession, by taking help of some shrewd juniors. This does not discouraged me. I kept my service. Some politicians and professional rivalries colluded to suppress me because i have started online "Tumkur Leaks" a FB portal which published all land mafia records and events of my locality. This effort by me has greatly harmed me in my carrier and it went to the extent of conspiracy to kill me through injecting poison. I suffered brain hemorrhage and survived and withdrawn from all such activity. My property was surrounded by Muslim jihad mafia and Hindu land mafia elements,

advocates, politicians, bureaucrats. That was tactfully cleared from my patience and persuasion, by withdrawing all "Tumkur Leaks" contents from online.

An advocate who has grabbed government land both in his office space and house space has made great effort to finish me, because i know their drawbacks and raised one such issue. Another advocate who has house in railway buffer zone acquired land colluded with that advocate. They have made great efforts to bring bad name in my profession. Still my clients and opponents who has seen my honesty has brought me up to this stage in profession. In one land acquired for about 100 acres some 10 acres were looted by forming layout in the heart of city. There many popular advocates reside. For poking all those things entire land looters united to take my life by colluding with politicians.

If local land audit takes place in tumkur, present politicians who had made land mafia deals by looting government land will go to jail. For suppressing such, all politicians in Tumkur got united and they will watch in such a way that they are successful in getting ex judge to be appointed as Land grabbing court head who is having Tumkur as his base. At all times a team is behind me seeking my death. I know one day they will finish me, before that my cherished book publishing effort is also spoiled, iam publishing this online to reach every interested reader. Please be aware about what hurted me in my life, do not make such venture without any perfect

backup. In present scenario, even PM Modi is facing lot of problems with such land looters only. The base of land looters is more widely spread in India. Many people were made accomplices in such land loot, once you poke the nose, all will get united, at any cost they want to save their loot. They either finish you or your development or profession. Keeping such hazard you have to plan in a unique way to bring out land looters to audit in long run strategy.

Please share this book link to all the needy, this cannot be downloaded but can be studied online. I request any of the publisher who can publish and distribute it in low price, will contact me and take my research material. Many other topic books under way of research.

Thanking you

Sridhara babu N

15-04-2020

Tumkur

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CHAPTER-1

LENDING AND RECOVERY NORMS

RBI LOAN RECOVERY CODE & GUIDELINES

The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI") and the Security Interest (Enforcement) Rules, 2002 ("SIER") framed thereunder provide some of the procedures by which security interests may be recovered. In addition to SARFAESI and SIER, the Reserve Bank of India ("RBI") has promulgated Guidelines on the subject. The RBI Guidelines on Fair Practices Code for Lenders dated 5.5.2003 provides at (v)(c) that: "In the matter of recovery of loans, the lenders should not resort to undue harassment viz. persistently bothering the borrowers at odd hours, use of muscle power for recovery of loans, etc."

A more comprehensive version of these Guidelines was released on April 24, 2008. The Guidelines expressly reference the 5.5.2003 Guidelines at (i)(x) with regard to the methods by which recovery agents collect on security interests. In addition, the April 24, 2008 Guidelines further referred paragraph 6 of the "Code of Bank's Commitment to Customers" (BCSBI Code) pertaining to collection of dues. The BCSBI Code at para 6 inter alia provides:

"All the members of the staff or any person authorized to represent our bank in collection or/and security

repossession would follow the guidelines set out below:

1. You would be contacted ordinarily at the place of your choice and in the absence of any specified place at the place of your residence and if unavailable at your residence, at the place of business/occupation.
2. Identity and authority to represent would be made known to you at the first instance.
3. Your privacy would be respected.
4. Interaction with you would be in a civil manner.
5. Normally our representatives will contact you between 0700 hours and 1900 hrs, unless the special circumstances of your business or occupation require otherwise.
6. Your requests to avoid calls at a particular time or at a particular place would be honored as far as possible.
7. Time and number of calls and contents of conversation would be documented.
8. All assistance would be given to resolve disputes or differences regarding dues in a mutually acceptable and in an orderly manner.
9. During visits to your place for dues collection, decency and decorum would be maintained.
10. Inappropriate occasions such as bereavement in the family or such other calamitous occasions would be avoided for making calls/visits to collect dues.

As noted above, this Code as well as others has been incorporated into the April 24, 2008 Guidelines:
"(ix) A reference is invited to (a) Circular

DBOD.Leg.No.BC.104/ 09.07.007 /2002-03 dated May 5, 2003 regarding Guidelines on Fair Practices Code for Lenders (b) Circular DBOD.No.BP. 40/ 21.04.158/ 2006-07 dated November 3, 2006 regarding outsourcing of financial services and (c) Master Circular DBOD.FSD.BC.17/ 24.01.011/2007-08 dated July 2, 2007 on Credit Card Operations. Further, a reference is also invited to paragraph 6 of the 'Code of Bank's Commitment to Customers' (BCSBI Code) pertaining to collection of dues. Banks are advised to strictly adhere to the guidelines / code mentioned above during the loan recovery process."

In the letter accompanying its April 24th, 2008 Guidelines on Engagement of Recovery Agents, RBI stated: "In view of the rise in the number of disputes and litigations against banks for engaging recovery agents in the recent past, it is felt that the adverse publicity would result in serious reputational risk for the banking sector as a whole." RBI has taken this issue seriously, as evidenced by the penalty that banks could face if they fail to comply with the Guidelines. The relevant portion of the Guidelines formulated by RBI is set out as under:

"3. Banks, as principals, are responsible for the actions of their agents. Hence, they should ensure that their agents engaged for recovery of their dues should strictly adhere to the above guidelines and instructions, including the BCSBI Code, while engaged in the process of recovery of dues.

4. Complaints received by Reserve Bank regarding violation of the above guidelines and adoption of abusive practices followed by banks' recovery agents would be viewed seriously. Reserve Bank may consider imposing a ban on a bank from engaging recovery agents in a particular area, either jurisdictional or functional, for a limited period. In case of persistent breach of above guidelines, Reserve Bank may consider extending the period of ban or the area of ban. Similar supervisory action could be attracted when the High Courts or the Supreme Court pass strictures or impose penalties against any bank or its Directors/ Officers/ agents with regard to policy, practice and procedure related to the recovery process.

5. It is expected that banks would, in the normal course ensure that their employees or agents also adhere to the above guidelines during the loan recovery process."

RECOVERY OF PUBLIC DUES

Ram Kishun and Ors. vs. State of U.P. and Ors.:
MANU/SC/0494/2012 - AIR 2012 SC 2288

8. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets

in any unreasonable or arbitrary manner in flagrant violation of statutory provisions.

9. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of statute. (Vide: Lachhman Dass v. Jagat Ram and Ors. MANU/SC/7133/2007 : (2007) 10 SCC 448; and Narmada Bachao Andolan v. State of Madhya Pradesh and Anr. AIR 2011 SC 1589).

Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance of the statutory provisions.

10. In case the property is disposed of by private treaty without adopting any other mode provided under the statutory rules etc., there may be a possibility of collusion/fraud and even when public auction is held, the possibility of collusion among the bidders cannot be ruled out. In The State of Orissa and Ors. v. Harinarayan Jaiswal and Ors. MANU/SC/0379/1972 : AIR 1972 SC 1816, this Court held that a highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

11. In Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr. MANU/SC/0056/2002 : AIR 2002 SC 834, this Court considered this aspect and while placing reliance upon its earlier judgment

in Chairman and Managing Director, SIPCOT Madras and Ors. v. Contromix Pvt. Ltd. by its Director (Finance) Seeetharaman, Madras and Anr. MANU/SC/0313/1995 : AIR 1995 SC 1632 held that in the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer.

12. Therefore, it becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price. Thus essential ingredients of such sale remain a correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them, as a moneyed person or a big businessman may not like to involve himself in small sales/deals.

POWER OF RECOVERY AS PER LAW

Apex Court in Karnataka State Financial Corporation v. N. Narasimahaiah & others, (2008)

5 SCC 176 When a statutory power is conferred, it is a trite law that the same must be exercised within the four corners of the Statute. Power of a lender to realize the amount lent either by enforcing the charged and / or hypothecated or encumbrance created on certain

property and/ or proceeding simultaneously and/ or independently against the surety/ guarantor is a statutory right. Different statutes provide for different remedies. We may by way of example refer to Pawan Kumar Jain v. Pradeshia Industrial and Investment Corporation of U.P. Ltd. and Others [(2004) 6 SCC 758] where a statutory mandate has been given to realize the dues from sale of the mortgaged properties and then to sell other properties of the borrower. Such a right can also indisputably be conferred by way of contract as has been provided for under Section 69 of the Transfer of Property Act in terms whereof a mortgagee is entitled to effect sale without the intervention of the court, subject, of course, to the limitations prescribed therein. If special provisions are made in derogation to the general right of a citizen, the statute, in our opinion, should receive strict construction. Section 29 State Financial Corporations Act, 1951, nowhere states that the corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. The right of the financial corporation in terms of Section 29 of the Act must be exercised only on a defaulting party. There cannot be any default as is envisaged in Section 29 by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter. It is significant to notice that sub-section (4) of Section 29 of the Act which lays down appropriation of the sale proceeds only refers to

'industrial concern' and not a 'surety' or 'guarantor'.
 The provisions of Section 128 of the Indian Contract Act must also be kept in mind. It is only by reason thereof, subject of course to the contract by the parties thereto, the liability of a surety is made coextensive with the liability of the principal debtor. ... The legislative intent, in our opinion, is manifest. The intention of the Parliament in enacting Sections 29 and 31 of the Act was not similar. Whereas Section 29 of the Act consists of the property of the industrial concern, Section 31 takes within its sweep both the property of the industrial concern and as that of the surety. None of the provisions control each other. The Parliament intended to provide an additional remedy for recovery of the amount in favour of the Corporation by proceeding against a surety only in terms of Section 31 of the Act and not under Section 29 thereof.

Raghunath Rai Bareja and Ors. vs. Punjab National Bank and Ors.: MANU/SC/5456/2006 - (2007) 2 SCC 230 It is well settled that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with the Latin maxim 'dura lex sed lex', which means 'the law is hard, but it is the law'. Equity can only supplement the law, but it cannot supplant or override it.

Thus, in *Madamanchi Ramappa and Anr. v. Muthaluru Bojjappa* MANU/SC/0008/1963 : [1964]2SCR673 this Court observed: ...what is administered in Courts is justice according to law, and

considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law....

In Council for Indian School Certificate Examination v. Isha Mittal and Anr. MANU/SC/2751/2000 : (2000) 7 SCC 521 this Court observed: ...Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law.

Similarly in P.M. Latha and Anr. v. State of Kerala and Ors. MANU/SC/0190/2003 : [2003]2SCR653 this Court observed: Equity and law are twin brothers and law should be applied and interpreted equitably, but equity cannot override written or settled law....

In Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr. MANU/SC/0287/2003 : [2003]3SCR409 this Court observed: It is now well settled that when there is a conflict between law and equity the former shall prevail....

Similarly in Nasiruddin and Ors. v. Sita Ram Agarwal MANU/SC/0100/2003 : [2003]1SCR634 this Court observed: In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom....

Similarly in E. Palanisamy v. Palanisamy (Dead) by Lrs. and Ors. MANU/SC/0967/2002 : AIR2003SC153 this Court observed: ...Equitable

considerations have no place where the statute contained express provisions....

In *India House v. Kishan N. Lalwani* MANU/SC/1182/2002 : [2002]SUPP5SCR522 this Court held that: ...The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from by equitable considerations....

BANK CANNOT EMPLOY GOONDAS TO LOAN RECOVERY

The Hon'ble Supreme Court in **ICICI Bank Ltd. Vs. Prakash Kaur, (2007) 2 SCC 711**, in which a borrower got his truck financed by ICICI Bank and on default of the payments, her truck was repossessed by the Bank by using force and without issuing any notice, was of the view that instead of taking resort to strong arm tactics the Bank should follow the procedure recognised by law to take repossession of the vehicle in cases where the borrower has defaulted in payment of the instalments. It was also observed for many a time even notice is not given to the borrowers prior to repossession causing embarrassment to the borrower when it is ceased in public. In this judgement it is pertinent to note that Hon'ble Justice Altamas Kabir has observed that the procedure adopted by the Bank in removing the vehicle from the possession of the borrower was not at all appreciated. During the course of a separate

judgement, Hon'ble Dr. Justice A.R. Laxmanan noted that the financier should follow RBI guidelines both in respect of lending and recovery which contemplate that no use of force or abuse should be used in recovery proceedings. The banking procedure should be people-friendly at the same time strict in their enforcement and educative enough to guide the public of the benefits of prudent banking and saving at the same time, enlighten them on the pitfalls of borrowings or taking credit from institutions for various purposes, way beyond their means. The Hon'ble Justice concluded that we are all governed by rule of law in the country and the recovery of loan or seizure of vehicles could be done only through legal means. The same ratio was reinforced by the Hon'ble Supreme Court in Citicorp. Maruti Finance Ltd. Vs. S. Vijalaxmi 2012 AIR SCW 251, in which a Three Judge Bench of the Apex Court reiterated as under: "We reiterate the earlier view taken that even in case of mortgaged goods subject to Hire Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates such recovery to be affected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the Agreement to take back possession of the vehicle by use of force".

HIRER CONTINUES TO BE OWNER – THAT DOES NOT ENTITLE HIM TO SEIZE THE VEHICLE

Hon'ble Supreme Court in **Citicorp Maruti Finance Ltd. vs. S.Vijayalaxmi [(2012)1 SCC 1]** wherein the Hon'ble Supreme Court was pleased to lay down as under: "27. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by Reserve Bank of India as well as the appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot but be struck down."

In the case of Anup Sarmah v. Bhola Nath Sharma & others, reported in (2013)1 SCC 400 it was held as follows:- "7. In view of the above, the law can be summarised that in an agreement of hire purchase, the purchaser remains merely a trustee/ bailee on behalf of the financier/ financial institution and ownership remains with the latter. Thus, in case the vehicle is seized by the financier, no criminal action can be taken against him as he is repossessing the goods owned by him."

In Orix Auto Finance (India) Limited v. Jagmander Singh and Anr. MANU/SC/0866/2006 : (2006) 2 SCC 598, referring to public policy, Court has taken the view that if agreements permit the financier to take possession of the finances vehicles, there is no legal impediment on such possession being taken, unless the contract is held to be unconscionable or opposed to public policy"

Karnataka High Court reported in **MANU/KA/0178/1978 (Jagadeesan v. State of Karnataka)** wherein the High Court had held that the financier under the Hire purchase agreement was entitled to have the custody of the vehicle in view of the provisions contained in the hire purchase agreement. The learned Judge very much relied upon the decisions of the Supreme Court in the case of *K.L. Johar & Co. v. Commercial Tax Officer* MANU/SC/0348/1964 : AIR 1965 SC 1082 and in the case of *Sundaram Finance Ltd. v. State of Kerala* MANU/SC/0299/1965 : [1966] 2 SCR 828 . In *K. L. Johar and Co.'s* case, the Supreme Court brought out a distinction between a "hire purchase agreement" and a "sale" and held: ...Thus the intending purchaser is known as the hirer so long as the option to purchase is not exercised and the essence of a hire purchase agreement properly so called is that the property in the goods does not pass at the time of the agreement but remains in the intending seller and only passes later when the option is exercised by the intending

purchaser. The distinguishing feature of a hire purchase agreement is that the property does not pass when the agreement is made but only passes when the option is finally exercised after complying with all the terms of the agreement. The learned Judge of the Karnataka High Court also took into consideration the distinction of the term "owner" in Section 2(19) of the Motor Vehicles Act and held that in view of the terms of the hire purchase agreement and the ratio of the two decisions of the Supreme Court in the two cases referred to supra, the financier is the real owner of the vehicle purchased under a hire purchase agreement until and unless all the instalments are paid by the borrower and, therefore, was entitled to take the custody of the vehicle from the Magistrate.

Sardar Trilok Singh and Ors. vs. Satya Deo Tripathi: MANU/SC/0231/1979 - Respondent purchased a truck on hire purchase agreement - Hire purchase agreement consisted a clause that in case of failure to pay installment in time truck was liable to be seized - Respondent failed to pay third installment in time - Appellant seized the truck - Respondent filed complaint against appellant alleging dacoity on part of appellants - Criminal proceedings initiated against appellants for offence under Section 395 - Hence, present appeal - Appellants went and seized truck from respondent house on his failure to pay third monthly installment in time and thus it was a bona fide civil dispute which led to seizure of trucks - Facts

revealed that respondent gave a exaggerated version that appellant went with a mob armed with deadly weapons and committed offence of dacoity by taking away the truck - No body on the side of respondent got even a scratch - Held, criminal proceedings initiated by respondent liable to be set aside.

Managing Director, Orix Auto Finance (India) Ltd.

v. Shri Jagmander Singh MANU/SC/0866/2006 :

(2006) 2 SCC 598 their Lordships held: Before we part with the case, it is relevant to take note of submission of learned Counsel for the hirer that in several cases different High Courts have passed orders regarding the right to repossess where High Courts have entertained writ petitions including writ petitions styled as PIL on the question of right of financiers to take possession of the vehicle in terms of the agreement. It is stated that direction have been given to the RBI for framing guidelines in this regard. If it is really so, the orders prima facie have no legal foundation, as virtually while dealing with writ petitions subsisting contracts are being re-written. It is still more surprising that petitions styled as PIL are being entertained in this, regard. Essentially these are matters of contract and unless the party succeeds in showing that the contract is unconscionable or opposed to public policy the scope of interference in writ petitions in such contractual matters is practically non-existence. If agreements permit the financier to take possession of the financed vehicles,

there is no legal impediment on such possession being taken. Of course, the hirer can avail such statutory remedy as may be available. But mere fact the possession has been taken cannot be a ground to contend that the hirer is prejudiced. Stand of learned Counsel for the respondent that convenience of the hirer cannot be overlooked and improve seizure cannot be made There cannot be any generalization in such matters. It would not be therefore proper for the High Courts to lay down any guideline which would in essence amount to variation of the agreed terms of the agreement. If any such order has been passed effect of the same shall be considered by the concerned High Court in the light of this judgment and appropriate orders shall be passed.

Sundaram Finance Limited vs. The Transport Commissioner, Chennai and Ors. : MANU/TN/1019/2019 - Where in the original certificate of registration, there is an entry in favour of the financier and the financier has taken possession of the vehicle in question in terms of the agreement, the authority is obliged to cancel the earlier certificate of registration and issue a fresh certificate of registration in the name of the financier. It may be relevant to take note of the definition of the term "owner" as set out in Section 2(30) of the Act. It defines the owner as a person in whose name a motor vehicle stands registered, and in relation to a motor vehicle which is the subject matter of a hire-purchase agreement, or

an agreement of hypothecation, the person in possession of the vehicle under that agreement. Of-course, this definition can be read either way. Even though in the case of hire-purchase agreement, the vehicle is in the name of the financier, since the borrower is in possession of the vehicle under the agreement, the expression "owner" would only refer to the borrower. Where the borrower has committed default and even though the vehicle stands in his name, if the financier has taken possession of the vehicle under the agreement, it is the financier who will have to be considered as the owner. That is why, Section 51(5) of the Act categorically mandates the registering authority to issue a fresh certificate of registration in favour of the financier when the registered owner declines to surrender the original certificate of registration. This is the logical effect of a conjoint reading of Section 2(30) of the Act r/w Section 51(5) of the Act in the light of Rule 60 and Form-36 and Form -37.

The Hon'ble Apex Court in the case of **Anup Sarmah v. Bhola Nath Sharma and Others, reported in MANU/SC/0937/2012 : (2013) 1 S.C.C. 400**, while dealing with a case of similar nature, held as under:-
 ".....the law can be summarized that in an agreement of hire purchase, the purchaser remains merely a trustee/bailee on behalf of the financier/financial institution and ownership remains with the latter. Thus, in case the vehicle is seized by

the financier, no criminal action can be taken against him as he is repossessing the goods owned by him."

RBI POWERS TO FRAME POLICIES TO BE FOLLOWED BY BANKS IN LENDING

Central Bank of India v. Ravindra, MANU/SC/0663/2001 : (2002) 1 SCC 367: "The Banking Regulation Act, 1949 empowers the Reserve Bank, on it being satisfied that it is necessary or expedient in the public interest or in the interest of depositors or banking policy so to do, to determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular and when the policy has been so determined it has a binding effect. In particular, the Reserve Bank of India may give directions as to the rate of interest and other terms and conditions on which advances or other financial accommodation may be made. Such directions are also binding on every banking company. Section 35-A also empowers the Reserve Bank of India in the public interest or in the interest of banking policy or in the interests of depositors (and so on) to issue directions generally or in particular which shall be binding. With effect from 15-2-1984 Section 21-A has been inserted in the Act which takes away power of the court to reopen a transaction between a banking company and its debtor on the ground that the rate of interest charged is excessive. The provision has been given an

overriding effect over the Usury Loans Act, 1918 and any other provincial law in force relating to indebtedness. During the course of hearing it was brought to our notice that in view of several usury laws and debt relief laws in force in several States private moneylending has almost come to an end and needy borrowers by and large depend on banking institutions for financial facilities. Several unhealthy practices having slowly penetrated into prevalence were pointed out. Banking is an organised institution and most of the banks press into service long-running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein, and bind themselves by the stipulations articulated by the best of legal brains. Borrowers other than those belonging to the corporate sector, find themselves having unwittingly fallen into a trap and rendered themselves liable and obliged to pay interest the quantum whereof may at the end prove to be ruinous. At times the interest charged and capitalised is manifold than the amount actually advanced. Rule of damdupat does not apply. Penal interest, service charges and other overheads are debited in the account of the borrower and capitalised of which debits the borrower may not even be aware. If the practice of charging interest on quarterly rests is upheld and given a judicial recognition, unscrupulous banks may resort to charging interest even on monthly rests and capitalising the same. Statements of accounts supplied by banks to

borrowers many a times do not contain particulars or details of debit entries and when written in hand are worse than medical prescriptions putting to test the eyes and wits of the borrowers. Instances of unscrupulous, unfair and unhealthy dealings can be multiplied though they cannot be generalised. Suffice it to observe that such issues shall have to be left open to be adjudicated upon in appropriate cases as and when actually arising for decision and we cannot venture into laying down law on such issues as do not arise for determination before us. However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under:The power conferred by Sections 21 and 35-A of the Banking Regulation Act, 1949 is coupled with duty to act. The Reserve Bank of India is the prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of the public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. The Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with the rate of interest which can be

charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy."

Sudhir Shantilal Mehta v. Central Bureau of Investigation, MANU/SC/1415/2009 : (2009) 8 SCC 1, ; "In terms of Section 35-A of the 1949 Act, Reserve Bank of India is empowered to issue directions to the banks in public interest; or in the interest of banking policy; or to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interest of the banking company; or to secure the proper management of any banking company generally.....Reserve Bank of India in terms of Section 21 of the 1949 Act is empowered to control advances by banking companies and issue necessary directions in this behalf. Reserve Bank of India, therefore, has the requisite power to issue direction to banks in relation to discounting and rediscounting of bills of exchange and those directions issued by Reserve Bank of India have statutory force and, thus, can be termed as law in force. (See also Corporation Bank v. D.S. Gowda

[MANU/SC/0788/1994 : (1994) 5 SCC 213] and Central Bank of India v. Ravindra [MANU/SC/0663/2001 : (2002) 1 SCC 367].) All public sector banks are bound thereby.

ICICI Bank Ltd. v. APS Star Industries Ltd., MANU/SC/0782/2010 : (2010) 10 SCC 1, Court,

when it came to whether derivatives could be a business which banks could do, stated with respect to Sections 21 and 35A of the RBI Act as follows: "Section 21 deals with the power of RBI to control advances by banking companies. Section 21 empowers RBI to frame policies in relation to advances to be followed by banking companies. It further says that once such policy is made all banking companies shall be bound to follow them. Section 21(1) is once again a general provision empowering RBI to determine policy in relation to advances whereas Section 21(2) empowers RBI to give directions to banking companies as to items mentioned there i.e. in Section 21(2). Under Section 21(3) every banking company is bound to comply with directions given by RBI at the peril of penalty being levied for non-compliance. Section 35-A says that where RBI is satisfied that in the interest of banking policy it is necessary to issue directions to banking companies it may do so from time to time and the banking companies shall be bound to comply with such directions. Thus, in exercise of the powers conferred by Sections 21 and 35-A of the said Act, RBI can issue directions having statutory force of law.

Section 36 deals with further powers and functions of RBI. Under Section 39 it is RBI which shall be the Official Liquidator in any proceedings concerning winding up of a banking company." The BR Act, 1949 basically seeks to regulate banking business. In the cases in hand we are not concerned with the definition of banking but with what constitutes "banking business". Thus, the said BR Act, 1949 is an open-ended Act. It empowers RBI (regulator and policy framer in matter of advances and capital adequacy norms) to develop a healthy secondary market, by allowing banks inter se to deal in NPAs in order to clean the balance sheets of the banks which guideline/policy falls Under Section 6(1)(a) read with Section 6(1)(n). Therefore, it cannot be said that assignment of debts/NPAs is not an activity permissible under the BR Act, 1949. Thus, accepting deposits and lending by itself is not enough to constitute the "business of banking". The dependence of commerce on banking is so great that in modern money economy the cessation even for a day of the banking activities would completely paralyse the economic life of the nation. Thus, the BR Act, 1949 mandates a statutory comprehensive and formal structure of banking Regulation and supervision in India."

NO PERSON HAS VESTED RIGHT IN PROCEDURE

Supreme Court in the case of Shiv Shakti Coop. Housing Society, Nagpur vs. Swaraj Developers and Others: (2003) 6 SCC 659 has observed (in paragraph 32): "...No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation."

ICICI Bank vs. Shanti Devi Sharma and Ors.: MANU/SC/7720/2008 - (2008) 7 SCC 532

Financial institutions are bound by law and therefore, recovery of loans or seizure of vehicles can only be done through legal means and prescribed procedures.

11. The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI") and the Security Interest (Enforcement) Rules, 2002 ("SIER") framed thereunder provide some of the procedures by which security interests may be recovered. In addition to SARFAESI and SIER, the Reserve Bank of India ("RBI") has promulgated Guidelines on the subject. The RBI Guidelines on Fair Practices Code for Lenders dated 5.5.2003 provides at (v)(c) that: "In the matter of recovery of loans, the lenders should not resort to undue harassment viz. persistently bothering the borrowers at odd hours, use of muscle power for recovery of loans, etc."

12. A more comprehensive version of these Guidelines was recently released on April 24, 2008. The Guidelines expressly reference the 5.5.2003 Guidelines at (i)(x) with regard to the methods by which recovery agents collect on security interests. In addition, the April 24, 2008 Guidelines further referred paragraph 6 of the "Code of Bank's Commitment to Customers" (BCSBI Code) pertaining to collection of dues. The BCSBI Code at para 6 inter alia provides:

All the members of the staff or any person authorized to represent our bank in collection or/and security repossession would follow the guidelines set out below:

1. You would be contacted ordinarily at the place of your choice and in the absence of any specified place at the place of your residence and if unavailable at your residence, at the place of business/occupation.
2. Identity and authority to represent would be made known to you at the first instance.
3. Your privacy would be respected.
4. Interaction with you would be in a civil manner.
5. Normally our representatives will contact you between 0700 hours and 1900 hrs, unless the special circumstances of your business or occupation require otherwise.
6. Your requests to avoid calls at a particular time or at a particular place would be honored as far as possible.

7. Time and number of calls and contents of conversation would be documented.

8. All assistance would be given to resolve disputes or differences regarding dues in a mutually acceptable and in an orderly manner.

9. During visits to your place for dues collection, decency and decorum would be maintained.

10. Inappropriate occasions such as bereavement in the family or such other calamitous occasions would be avoided for making calls/visits to collect dues.

As noted above, this Code as well as others has been incorporated into the April 24, 2008 Guidelines:

(ix) A reference is invited to (a) Circular DBOD.Leg. No. BC.104/ 09.07.007 /2002-03 dated May 5, 2003 regarding Guidelines on Fair Practices Code for Lenders (b) Circular DBOD. No. BP. 40/ 21.04.158/ 2006-07 dated November 3, 2006 regarding outsourcing of financial services and (c) Master Circular DBOD.FSD.BC.17/ 24.01.011/2007- 08 dated July 2, 2007 on Credit Card Operations. Further, a reference is also invited to paragraph 6 of the 'Code of Bank's Commitment to Customers' (BCSBI Code) pertaining to collection of dues. Banks are advised to strictly adhere to the guidelines / code mentioned above during the loan recovery process.

13. RBI has expressed its concern about the number of litigations filed against the banks in the recent past for engaging recovery agents who have purportedly violated the law. In the letter accompanying its April 24th, 2008 Guidelines on Engagement of Recovery

Agents, RBI stated: "In view of the rise in the number of disputes and litigations against banks for engaging recovery agents in the recent past, it is felt that the adverse publicity would result in serious reputational risk for the banking sector as a whole." RBI has taken this issue seriously, as evidenced by the penalty that banks could face if they fail to comply with the Guidelines. The relevant portion of the Guidelines formulated by RBI is set out as under:

3. Banks, as principals, are responsible for the actions of their agents. Hence, they should ensure that their agents engaged for recovery of their dues should strictly adhere to the above guidelines and instructions, including the BCSBI Code, while engaged in the process of recovery of dues.

4. Complaints received by Reserve Bank regarding violation of the above guidelines and adoption of abusive practices followed by banks' recovery agents would be viewed seriously. Reserve Bank may consider imposing a ban on a bank from engaging recovery agents in a particular area, either jurisdictional or functional, for a limited period. In case of persistent breach of above guidelines, Reserve Bank may consider extending the period of ban or the area of ban. Similar supervisory action could be attracted when the High Courts or the Supreme Court pass strictures or impose penalties against any bank or its Directors/ Officers/ agents with regard to policy, practice and procedure related to the recovery process.

5. It is expected that banks would, in the normal course ensure that their employees or agents also adhere to the above guidelines during the loan recovery process.

14. We deem it appropriate to remind the banks and other financial institutions that we live in a civilized country and are governed by the rule of law.

Shilpa Shares and Securities and Ors. vs. The National Co-operative Bank Ltd. and Ors.: MANU/SC/7612/2007 - AIR 2007 SC 1874 -

4. In pursuance to the recovery, recourse was taken to the procedure for attachment and sale of the property of the appellant prescribed in Rule 107 of the Rules, framed under the Act. An auction was held for sale of the appellants' properties. Under Rule 107(11)(g) of the Rules, 15% of the price of the immovable property has to be deposited by the auction purchaser at the time of the purchase, and the remaining 85% of the purchase money has to be paid within 15 days from the date of such sale. Admittedly, in the present case, the aforesaid 85% of the purchase money was not paid within 15 days from the date of the sale nor even thereafter.

5. In *Manilal Mohanlal Shah and Ors. v. Sardar Sayed Ahmed Sayed Mahmad and Anr.* MANU/SC/0005/1954 : [1955] 1 SCR 108, it has been held that in such circumstances there is no sale at all if the balance purchase money is not paid within 15 days. It is not a mere irregularity. Non-payment of the said

amount renders the sale proceedings a complete nullity.

6. In *Balram v. Ilam Singh and Ors.* MANU/SC/0716/1996 : AIR 1996 SC 2781 , it has been held that the obligation of the purchaser to deposit the full purchase money within time is a mandatory requirement and non-compliance of the rule renders the sale a nullity and not a mere irregularity.

IRRESPONSIBILITY OF BANK IN TAKING APPROPRIATE REMEDY

Eureka Forbes Limited vs. Allahabad Bank and Ors. 2010 (6) SCC 193 - MANU/SC/0322/2010 - The Bank had been negligent and, to some extent, irresponsible, in invoking its rights and taking appropriate remedy in accordance with law. Mere irresponsibility, on the part of the Bank, would not wipe out the rights of the Bank in law.

In our considered opinion, the scheme of the Recovery Act and language of its various provisions imposes an obligation upon the Banks to ensure a proper and expeditious recovery of its dues. In the present case, there is certainly ex facie failure of statutory obligation on the part of the Bank and its officers/officials. In the entire record before us, there is no explanation much less any reasonable explanation as to why effective steps were not taken and why the interest of the Bank was permitted to be

jeopardized. The concept of public accountability and performance is applicable to the present case as well. These are instrumentalities of the State and thus all administrative norms and principles of fair performance are applicable to them with equal force as they are to the Government department, if not with a greater rigor. The well established precepts of public trust and public accountability are fully applicable to the functions which emerge from the public servants or even the persons holding public office. In the case of *State of Bihar v. Subhash Singh* MANU/SC/0325/1997 : (1997) 4 SCC 430, this Court, in exercise of the powers of judicial review stated that, the doctrine of full faith and credit applies to the acts done by officers in the hierarchy of the State. They have to faithfully discharge their duties to elongate public purpose.

Inaction, arbitrary action or irresponsible action would normally result in dual hardship. Firstly, it jeopardizes the interest of the Bank and public funds are wasted and secondly, it even affects the borrower's interest adversely provided such person was acting bonafide. Both these adverse consequences can easily be avoided by the authorities concerned by timely and coordinated action. The authorities are required to have a more practical and pragmatic approach to provide solution to such matters. The concept of public accountability and performance of functions takes in its ambit proper and timely action in accordance with law. Public duty and

public obligation both are essentials of good administration whether by the State instrumentalities and/or by the financial institutions. In the case of Centre for Public Interest Litigation and Anr. v. Union of India and Anr. MANU/SC/2091/2005 : (2005) 8 SCC 202, this Court declared the dictum that State actions causing loss are actionable under public law and this is as a result of innovation to a new tool with the court, which are the protectors of civil liberty of the citizens and would ensure protection against devastating results of State action. The principles of public accountability and transparency in State action even in the case of appointment, which essentially must not lack bonafide was enforced by the Court. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable both for their inaction and irresponsible actions. What ought to have been done, if not done, responsibility should be fixed on the erring officers then alone the real public purpose of an answerable administration would be satisfied.

The doctrine of full faith and credit applies to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. It is known fact that, in transactions of the Government business, none would own personal responsibility and decisions are leisurely taken at various levels (Refer : State of

Andhra Pradesh v. Food Corporation of India (2004)
13 SCC 53.

Principle of public accountability is applicable to such officers/officials with all its vigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, but are ex facie discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects not only in the decision making process but in the decision as well. Every public officer is accountable for its decision and actions to the public in the larger interest and to the State administration in its governance. It needs to be seen in the facts and circumstances of the present case, why and how the interest of the Bank has been jeopardized, in what circumstances the loan was sanctioned and disbursed despite some glaring defects having been exposed in the appraisal report. Significant element of discretion is vested in the officers/officials of the Bank while sanctioning and disbursing the loans but this discretion is circumscribed by the inbuilt commercial principles/restrictions as well as that such decisions should be free from arbitrariness, unreasonableness and should protect the interest of the Bank in all events. We are neither competent nor do we wish to venture to examine this aspect, it is for the appropriate authorities in the Bank to examine the matter from all quarters and then to take appropriate

action against the erring officers/officials involved in the present case, that too, in accordance with law.

In State of Andhra Pradesh v. Challa Ramkrishna Reddy and others [MANU/SC/0368/2000 : AIR 2000 SC 2083], the Supreme Court has noticed N. Nagendra Rao and Co. v. State of A.P. MANU/SC/0530/1994 : AIR 1994 SC 2663 wherein immunity of the State for sovereign functions has been explained as follows:- "But there the immunity ends. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with structural change in the society. No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with any other juristic legal entity. Any watertight compartmentalization of the functions of the State as 'sovereign and non-sovereign' or 'governmental or nongovernmental' is not sound. It is

contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown but merely because it was done by an officer of the State even though it was against law and negligently. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a welfare State is not shaken. Even in America where this doctrine of sovereignty found its place either because of the 'financial instability of the infant American States rather than to the stability of the doctrine theoretical foundation', or because of 'logical and practical ground', or that 'there could be no legal right as against the State which made the law gradually gave way to the movement from, 'State irresponsibility to State responsibility'. In welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a

constitutional Government, the State cannot claim any immunity." The Supreme Court ultimately has held as follows:- "This Court, through a stream of cases, has already awarded compensation to the persons who suffered personal injuries at the hands of the officers of the Government including police officers and personnel for their tortuous act. Though most of these cases were decided under public law domain, it would not make any difference as in the instant case, two vital factors, namely, police negligence as also the Sub-Inspector being in conspiracy are established as a fact. Moreover, these decisions, as far example, Nilabati Behera v. State of Orissa, MANU/SC/0307/1993 : (1993) 2 SCC 746: (1993) 2 SCR 581 : AIR 1993 SC 1960: (1993 AIR SCW 2366): In Re: Death of Sawinder Singh Grover, (1995) Supp (4) SCC 450: (1992) 6 JT (SC) 271: 1992(3) Scale 34(2); and D.K. Basu v. State of West Bengal, MANU/SC/0157/1997 : (1997) 1 SCC 416 : AIR 1997 SC 610: (1997 AIR SCW 233), would indicate that so far as fundamental rights and human rights or human dignity are concerned, the law has marched ahead like a Pegasus but the Government attitude continues to be conservative and it tries to defend its action or the tortuous action of its officers by raising the plea of immunity for sovereign acts or acts of State, which must fail."

NPA RESTRUCTURING THROUGH ASSIGNMENT OF DEBT FROM ONE BANK TO ANOTHER IS NOT TRADE - NO CONSENT FROM BORROWER NEEDED.

**ICICI Bank Ltd. v. APS Star Industries Ltd.,
MANU/SC/0782/2010 : (2010) 10 SCC 1**

At the outset one needs to know what is NPA? When a borrower who is under liability to pay to secured creditors, makes default in repayment of secured debt or any installment thereof, the account of borrower is classified as Non-Performing Asset (NPA). Such NPAs cannot be used for any productive purpose. Continuous growth in NPAs threatens the repayment capacity of the banks. They have an adverse impact on the financial strength of the banks which in the present era of globalization are required to conform to International Standards. Thus, NPA means an asset or account receivable of a borrower, which has been classified by banks or financial institutions in terms of RBI Guidelines as sub-standard, doubtful etc. These guidelines are issued to improve quality of assets of the banks. The 2005 guidelines of RBI are not to eliminate NPAs but to restructure. The BR Act, 1949 vide Section 21 empowers RBI in the interest of the Banking Policy to lay down guidelines in relation to advances to be followed by banking companies. The 2005 guidelines have been issued as "a restructuring

measure" in order to avoid setbacks in the banking system. NPAs do not generate interest. 85% of the Indian Banks' income comes from interest. Thus, NPAs adversely impact profits of the banks and hence, as a matter of Banking Policy, RBI as Regulator seeks through its guidelines under Section 21 r/w Section 35A to manage these NPAs and not to eliminate. The said guidelines deal with restructuring of the banking system which is one of the objects behind giving authority to RBI to frame "banking policy": One more aspect needs to be kept in mind. In this batch of cases we are dealing with assets in the hands of banks. NPAs are "Account Receivables". The impugned guidelines show that RBI considers inter se NPA assignment between banks to be a tool for resolving the issue of NPAs and in the interest of banking policy under Section 21 of the BR Act, 1949. The object is to minimize the problem of credit risk. The corporate debt restructuring is one of the methods for reducing NPAs. Thus, such restructuring as a matter of banking policy cannot be treated as "trading". One has to keep in mind the object behind enactment of BR Act, 1949. Thus, the said Guidelines fall under Section 21 of the 1949 Act. These Guidelines are a part of Credit Appraisal Mechanism. Thus, in our view the impugned Guidelines are not ultra vires the BR Act, 1949. Dealing in NPAs as part of the Credit Appraisal Mechanism and as a part of Restructuring Mechanism falls within Section 21 r/w Section 35A of the Act. Hence, it cannot be said that "transfer of

debts/NPAs" inter se between banks is an activity which is impermissible under the 1949 Act. The BR Act, 1949 is an Act enacted to consolidate and amend the law relating to banking. Thus, while interpreting the Act one needs to keep in mind not only the framework of the banking law as it stood in 1949 but also the growth and the new concepts that have emerged in the course of time,

Thus, in our view on reading the provisions of the BR Act, 1949 with the Guidelines of RBI issued from time to time in relation to Advances and Re-structuring/Management of NPAs we are of the view that the BR Act, 1949 is a complete Code on banking and that dealing in NPAs inter se by the banks needs to be looked in the larger framework of "Re-structuring of banking System". Thus, we need not go into the provisions of the said TP Act. In fact, it is the case of the borrower(s) that provisions of the said TP Act has no application.

In the alternative, since the borrower(s) has relied on Section 130 of the said TP Act, one needs to analyse the contentions raised in that regard. According to the borrower(s) assignment of Financial Instruments in possession of ICICI Bank Ltd. to Kotak Mahindra Bank Ltd. transfers not merely the right to recover the debt but also transfers the obligations under the Financial Instruments "as if they were executed by the clients of ICICI Bank in favour of the assignee", i.e., Kotak Mahindra Bank Ltd. According to the borrower(s), an assignment of a debt can never

carry with it the assignment of the obligations of the assignor unless there is a novation of the contract by all parties. therefore, according to the borrower(s), the impugned Deed of Assignment is legally unsustainable without novation of original contract between ICICI Bank Ltd. (assignor) and the borrower(s) (assignee). We find no merit in the above arguments.

As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the borrower(s). The moment ICICI Bank Ltd. transfers

the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee). At this stage, we wish to once again emphasize that debts are assets of the assignor bank. The High Court(s) has erred in not appreciating that the assignor bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned Deed of Assignment transfers any obligations of the assignor towards the assignee. In the case of *Khardah Company Ltd. v. Raymon and Co. (India) Private Ltd.* reported in (1963) 3 S.C.R. 183 the Supreme Court has held that the law on the subject of assignment of a contract is well settled. An assignment of a contract might result by transfer either of the rights or by transfer of obligations thereunder. There is a well recognized distinction between the two classes of assignments. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. That, rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an agreement between the parties. A benefit under the contract can always be assigned.

That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract.

Corporation Bank, Bangalore v. Lalitha H. Holla and Ors. MANU/KA/0019/1994 : AIR 1994 Kant 133 , wherein it has been held that: Power of attorney simpliciter authorising execution of acts does not create equitable assignment - Unless agency coupled with interest in favour of agent created or recognised, power of attorney not irrevocable though called so - Assignment of debt does not require registration, assignment of rents requires registration - Power of attorney creating equitable assignment of rents, if not registered void and unenforceable.

Supreme Court in **Bihar Eastern Gangetic Fisherman Co-operative Society Ltd. v. Sipahi Singh reported in MANU/SC/0060/1977** Thus a document creating an assignment of a debt will not require registration, but a document assigning rents will require registration. If the Power of Attorney in question is to be treated as creating an equitable assignment of rents, it will require registration and if not registered will be void and unenforceable. The power of Attorney in question as already held does not create or recognise any right in or relating to any immovable property or benefit arising therefrom in

favour of the Bank. It merely authorises the Bank to act as the Company's Agent to perform the acts stated therein. That is not an equitable assignment.

COURT POWER TO GRANT INSTALMENTS IN RECOVERY SUIT

Margadarshi Chit Fund Private ... vs Shreeyog Marketing Private Ltd. ... JUDGE V.V.S. Rao, J. - MANU/AP/0962/2002 - The Court has got the power to grant instalments when a personal decree or a decree for payment of money is passed. Such instalments can be granted even if apart from the prayer for a money decree, there is also a prayer for a declaration of charge in respect of certain movable properties with prayer for sale of the same. Order 20, Rule 11 applies in that case also. However, such order for instalment may be passed "for any sufficient reason" as laid down by Order 20, Rule 11 of C.P.C. Accordingly this is also a matter of discretion to be exercised judicially in the facts and circumstances of a particular case and not as a matter of course. There must be some "reason" and it must be "sufficient reason". Further, unless reasons are given, whether it is for any "sufficient reason" cannot be ascertained. Accordingly the Court should give reasons for grant of instalments.

35. The principles that emerge in the cases referred to hereinabove are as follows.

- i) Order XX, Rule 11 CPC is applicable to all money suits including summary suits filed under Order 37 CPC.
- ii) If a debtor simply says that he would not be able to pay money if a certain number of instalments are not granted that itself is not sufficient reason to grant instalments to pay the decretal amount.
- iii) There is no principle of law that the Court is entitled to postpone the decretal amount by one of the defendants till the decree is executed against other defendants who are jointly and severally liable under the decree.
- iv) Mere largeness of the amount (when the decree amount is substantially high) cannot by itself be a valid consideration for granting time to the defendant to pay the decretal amount in instalments.
- v) If the defendant without taking a plea in the written statement or stating so in the evidence on oath, merely making statement to the Court agreeing to pay the decretal amount in instalments that itself cannot be a ground for allowing the decretal amount to be paid in instalments.
- vi) The statement of the defendant that he was involved in some other suit concerning his business is not sufficient ground for granting instalments.
- vii) The trial Court while directing the postponement of the payment or payment in instalments as decreed must give ascertainable reasons and without any reasons, no instalment decree can be passed.

WHEN DEBTOR HAS NO MEANS TO PAY

Rajeti Prabhakara Rao vs. Mosa Satyavathi and Ors.: MANU/AP/0058/2019 : Justice U. Durga Prasad Rao, has discussed the following aspect on the matter:-

(a) Several modes of execution are provided for different types of decrees under Section 51 CPC, of which, execution of money decree is one. For convenience Section 51 is extracted as under:

51. Powers of Court to enforce execution:- Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree-

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by the sale without attachment of any property;
- (c) by arrest and detention in prison [for such period not exceeding the period specified in Section 58, where arrest and detention is permissible under that section]
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied-

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,-

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Explanation.-In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

(b) An insight into Section 51(c) makes it clear that one of the modes of execution of money decree is by arrest and detention in prison of the judgment debtor. Having regard to the lethality of the relief, it had been impassionately argued on behalf of the judgment debtors that committing the judgment debtors to civil prison for mere infringement of a contractual obligation would amount to flagrant violation of Article 11 of the

International Covenant on Civil and Political Rights (for short, 'the ICCP Rights') on one hand and Article 21 of the Constitution on the other, which argument was eruditely dealt with and decided by the renowned jurist V.R. Krishna Iyer in few judgments with reference to Section 51 CPC. In Xavier v. Canara Bank Limited, MANU/KE/0255/1969 :, one of the arguments advanced against the commission of J.Dr to civil prison in execution of a money decree was that ICCP Rights are part of the law of land and have to be respected by the municipal Courts and in that view, Article 11 of the aforesaid covenant militates and provides immunity from imprisonment of indigent and honest judgment debtors. Article 11 of ICCP Rights reads as under: "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation".

(c) An attempt was made in the said judgment to find out whether Section 51 CPC militates against the spirit of Article 11 of the international covenant. We will find in the proviso to Section 51 CPC that where the decree is for payment of money, execution by detention in prison shall not be ordered without following the conditions laid down in said proviso. Those conditions which are already extracted supra are meant to safeguard the interest of J.Drs. Therefore, the Court in an. arrest E.P. shall afford a notice to the J.Dr to give an opportunity to show-cause as to why he should not be committed to prison. Thereupon, recording its satisfaction that the judgment debtor with the object or

effect of obstructing or delaying the execution of decree, committed certain acts, commit him to civil prison. In Xavier's case (supra), the learned Judge taking these procedural safeguards into consideration observed that Section 51 has provided certain procedural safeguards that if the debtor has no means to pay he cannot be arrested and detained; if he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he would incur the liability to imprisonment under Section 51 CPC. Learned Judge held this does not violate the mandate of Article 11. It is further observed that if the judgment debtor once had the means, but now has not or if he has money now on which there are other pressing claims, it is violative of the spirit of Article 11 to arrest and confine him in jail so as to coerce him into payment. While observing, learned Judge however refused to accept the ambitious argument of Counsel for J.Dr that in view of Article 11 of ICCP Rights, J.Dr shall be given total immunity from arrest. It was held that the basic human rights enshrined in the international covenants may at best inform judicial institutions and inspire legislative action within member States; but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority. The essence of the above observation is that Section 51 CPC imbibes in it the spirit of Article 11 by providing certain procedural safeguards to the judgment debtor before he is committed to civil prison for violation of a civil decree.

Again in Jolly George Varghese v. The Bank of Cochin, MANU/SC/0014/1980 : AIR 1980 SC 470, the Apex Court (Hon'ble Judges Sri R.S. Pathak and Sri V.R. Krishna Iyer) in the backdrop of executing Court not conducting any investigation regarding the current ability of the J.Drs to clear off the debts or their mala fide refusal if any to discharge the debts, posed a question as to whether under such circumstances the personal freedom of the judgment debtors can be held in ransom until repayment of the debt, and if Section 51 read with Order XXI Rule 37 CPC is constitutional when tested on the touchstone of fair procedure under Article 21 and in conformity with the inherent dignity of the human person in the light of Article 11 of the I.C.C.P. Rights. In this context, referring to the Xavier's case (supra), the Apex Court observed as under:

"15. We concur with the Law Commission in its construction of Section 51 C.P.C. It follows that quondam affluence and current indigence without intervening dishonesty or bad faith in liquidating his liability can be consistent with Article 11 of the Covenant, because then no detention is permissible under Section 51, C.P.C.

16. Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence.

Maneka Gandhi's case MANU/SC/0133/1978 : [1978] 1 SCR 248 as developed further in Sunil Batra v. Delhi Administration, MANU/SC/0184/1978 : 1978 Cri. LJ 1741; Sita Ram and others v. State of U.P., MANU/SC/0244/1979 : 1979 Cri. LJ 659 and Sunil Batra v. Delhi Administration (supra), lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra Narayana, is no crime and to 'recover' debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay inspite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant. But this is precisely the interpretation we have put on the Proviso to Section 51 C.P.C. and the lethal blow of Article 21 cannot strike down the provision, as now interpreted."

Regarding the question whether Section 51 read with Order XXI Rule 37 CPC is violative of Article 21, it was observed as under: "18. The question may squarely arise some day as to whether the Proviso to Section 51 read with Order 21 Rule 37 is in excess of the Constitutional mandate in Article 21 and bad in part. In the present case since we are remitting the matter for reconsideration, the stage has not yet

arisen for us to go into the vires, that is why we are desisting from that essay."

Thus, the sum and substance of above quoted judgments is that Section 51(c) CPC though provides for committing the judgment debtor to civil prison, still such a mode of execution is not violative of Article 11 of the ICCP Rights for it provides procedural safeguards in the proviso of very same section. Thus, a mere nonpayment of decretal amount by J.Dr will not land him in civil prison without conducting enquiry and Court satisfying that one of the conditions mentioned in the proviso is satisfied to transmit him to the civil prison. In the context of Section 51 proviso (b), it was observed in those judgments that quondam affluence and current indigence or having sufficient means at present by the J.Dr alone is not sufficient unless there is a proof of his wilful failure to pay inspite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Therefore, there can be no scintilla of doubt that when an execution petition on the basis of money decree is filed for arrest of judgment debtor, the Court shall afford an opportunity to judgment debtor and conduct enquiry as to whether since the decree, the judgment debtor has, or has had the means to pay the amount of the decree or some substantial part thereof and still refuses or neglects or has refused or neglected to pay the same and then pass the reasoned order.

The next question is whether such an enquiry has to be conducted in the presence of the judgment debtor or in absentia?

The procedure as governed by Order XXI Rule 37 CPC and Rule 40 CPC which are as under: 37. Discretionary power to permit judgment-debtor to show-cause against detention in prison:-(1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court [shall], instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show-cause why he should not be committed to the civil prison:

[Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.]

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest:- (1) When a judgment-debtor appears before the Court in obedience to a notice issued under Rule 37, or is

brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why. he should not be committed to the civil prison.

(2) Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of Section 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.

The scheme of the code postulating the enquiry regarding means of the judgment debtor is thus explained in Order XXI Rules 37 and 40 CPC sufficiently. A decree holder who seeks execution by way of arrest and detention of the judgment debtor in civil prison shall file an affidavit in terms of Order XXI Rule 11-A CPC stating the grounds on which the arrest is applied for. Thereupon, the Court will have two options under Rule 37. If the Court is satisfied by the aforesaid affidavit and came to conclusion that with the object or effect of delaying the execution of the decree the judgment debtor is likely to abscond or leave the local jurisdiction of the Court, it can issue warrant of his arrest straight away for securing his presence or otherwise the Court, instead of issuing warrant of arrest, issue a notice calling upon judgment debtor to appear before it and show-cause why he should not be committed to civil prison. These are the options available to the Court. Then Rule 37(2) CPC envisages that pursuant to the notice, if the judgment debtor has not appeared, the Court shall, if the decree holder so requires, issue a warrant for the arrest of the judgment debtor. So, the Court can secure the presence of the judgment debtor either by way of summoning him or by

issuing warrant. It should be noted that issuing warrant of arrest under Rule 37(1) or (2) is only for securing the presence of the judgment debtor so as to proceed with an enquiry under Rule 40, but not to detain him in civil prison in terms of Sections 51 and 55 CPC. Therefore, at the stage of Order XXI Rule 37 CPC the Court need not look into the merits of the case as envisaged under Proviso to Section 51. The distinction between arrest under Rule 37 and detention under Section 51(c) was well explained in (i) *Suravarapu Putrayya v. Maddukuri Veerraju*, 1964 (2) An.WR 38 (DB) and (ii) *P.G. Ranganatha Padayachi v. The Mayavaram Financial Corporation Ltd.*, MANU/TN/0107/1974 : AIR 1974 Mad. 1.

Then Rule 40 speaks that when the judgment debtor either appears before the Court in obedience to the notice issued under Rule 37 or is brought before the Court after being arrested, the Court shall proceed to hear the decree holder and take the evidence produced by him in support of the execution petition and shall then give the judgment debtor an opportunity of showing cause why he should not be committed to civil prison. Further, pending aforesaid enquiry the Court in its discretion order the judgment debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required. On conclusion of enquiry, the Court may, subject to the provisions of Section 51, make an order for the detention of the judgment debtor in civil prison and shall, in that event,

cause him to be arrested if he is not already under arrest. When the Court does not make an order of detention, it shall disallow the execution petition and if the judgment debtor is under arrest, direct his release.

So, a careful analysis of the above two Rules, more particularly Rule 40, would give a clear connotation that the enquiry contemplated under Rule 40 shall be conducted in the presence of the judgment debtor. Such a mandate is understandable in the light of the fact that the enquiry sometimes may culminate in the arrest and detention of the judgment debtor in civil prison affecting his personal liberty. It gives a further understanding that ex parte enquiry in the absence of judgment debtor is uncalled for.

It was so held by a learned Single Judge in Kasi Subbaiah Mudali v. **Kasi Veeraswamy Mudali, MANU/AP/1397/2001 : 2002 (3) ALT 240**. In that case, the decree holder filed E.P. under Order XXI Rule 37 CPC for arrest and detention of the judgment debtor. The execution Court issued notice under Rule 37(1) CPC to judgment debtor, but due to his nonappearance set him ex parte and posted the matter for the evidence of decree holder. He was subsequently examined and the Court basing on the record gave a finding that the judgment debtor having sufficient means to pay the decree amount still avoided to pay the same and accordingly, issued warrant of arrest for production of the judgment debtor before the Court, which order was challenged in revision. In that context, it was held as under: "16.

Admittedly, in the present case, the Court has undertaken an ex parte enquiry and recorded an ex parte finding about the possession of means by the petitioner herein. The said exercise by the executing Court was contrary to the express or unambiguous provisions of Order 21, particularly Rule 40. The docket orders passed by the executing Court from time to time would indicate that it has not at all taken into account the requirement under Rule 40 of Order 21 or Section 55 of the C.P.C. The executing Court has not followed the express provisions of C.P.C., in passing the order under revision. The order cannot be sustained either in facts or in law. Accordingly, the same is set-aside and the C.R.P. is allowed. However, there shall be no order as to costs."

In Senthil Kumar v. K.M.N. Surendran (MANU/TN/1505/2012 : 2012 (3) CTC 294), a learned Judge of the Court applied the ratio in Jolly George to a judgment debtor." 26. Now, it is firmly settled that even in an execution petition under Order XXI, Rule 37 C.P.C., simply because the decree holder wishes that the judgment debtor should be made to count the bars of a Civil prison on account of his inability to pay the decree debt, the Court could not send the debtor to jail unless he has current ability to clear off the debt or he has mala fide refusal or he has some other vice or mens rea apart from his failure to foot the decree."

'Nandini Satpaty v. Dani (P.I.) and Anr.'
MANU/SC/0139/1978 : (1978) 2 SCC 424 : (AIR
1978 SC 1025)', where, it has been held by the Apex Court that the quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of the criminal law. The basic law of this country, the Constitution of India does not permit any person to be sentenced without following the due procedure under the law. Since, what has been done is that nothing is followed before penal provisions is invoked, this petition is entertained by this Court, considering the violation of basic law. If the implementation of decree by Civil Procedure Code requires detention in civil jail only after availing due opportunity as prescribed under the law. No one can be sentenced without even following the summary trial as specified under the law. It is one thing to get the order implemented as already provided under the C.P. Act or under CPC, but, once the penal provision is resorted to, the procedure prescribed simply cannot be overlooked or bypassed.

EXTENT OF ARREST IN CIVIL PRISION - MAXIMUM 3 MONTHS

Section 58 of the Civil Procedure Code also deserves reference:

"58. Detention and release:-

(1) Every person detained in the civil prison in execution of a decree shall be so detained,-

(a) where the decree is for the payment of a sum of money exceeding ["five thousand rupees"], for a period not exceeding-three months and]

(b) where the decree is for the payment of a sum of money exceeding two thousand rupees, but not exceeding five thousand rupees, for a period not exceeding six weeks:"]; Provided that he shall be released from such detention before the expiration of the [said period of detention]-

(i) on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance : Provided, also, that he shall not be released from such detention under Cl. (ii) or Cl.(iii), without the order of the Court.

[(1-A) For the removal of doubts, it is hereby declared that no order for detention of the judgment- debtor in civil prison in execution of a decree for the payment of money shall be made, where the total amount of the decree does not exceed ["two thousand rupees"].]

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable

to be re-arrested under the decree in execution of which he was detained in the civil prison."

NO DOCUMENTS TO SHOW SUFFICIENT MEANS

Korada Narayana Rao vs. Kudara Mutyalu: MANU/HY/0634/2018

As the order for arrest has to the effect of depriving the liberty of a person the conditions set out by the Higher Courts should be scrupulously followed. As held by Courts on many earlier occasions, unless there is a deliberate intention not to pay despite possessing sufficient means, an order of arrest should not be granted. In the case on hand, the decree holder was examined as PW 1. He did not file any documents to show that the judgment debtor was possessed sufficient means. The only documents exhibited by him are the legal notice and postal acknowledgment. He denied a suggestion that judgment debtor has no means to pay the decretal amount and agrees that he did not produce any document in evidence judgment debtor owns cars etc.

LAW COMMISSION VIEWS ON THE MATTER

The view of Law Commission, in its 54th report on Section 51(b) has been extracted, in the judgment by a three Judges Bench in RAM NARAYAN AGARWAL AND OTHERS VS. STATE OF UTTAR PRADESH AND

OTHERS [MANU/SC/0314/1983 : 1983 (4) SCC 276]
as under: "Situation in Section 51(b)-

1-E.12. Perhaps, it could be argued that imprisonment of the judgment-debtor in the situation in section 51, proviso, clause (b) causes hardship. That clause applies where the judgment-debtor (i) has the means and refuses or neglects to pay or (ii) has had the means and has refused or neglected to pay. The essential condition in either case is the possession of means, coupled with contemporaneous failure or neglect to pay, Imprisonment, if it follows in such cases, is not based on mere non-payment nor on mere inability to pay, but is confined to cases where a person is able to pay and dishonestly makes default in payment.

1-E.13. It will, thus, be seen that the provisions as to arrest do not violate the provision in the International Covenant, as they are not based on mere non-fulfilment of a contract. Further, even apart from their consistency with the Covenant, they are justifiable on principle because the conduct which attracts their operation is dishonest. Technically, no crime is committed, as there is no bodily harm to the decree-holder or direct harm to society. But, to deprive another person of this lawful dues when one has the means to pay is, in the special situations to which section 51, proviso, is confined ultimately causing harm to society, which suffers if an individual member suffers by reason of the dishonest conduct of another member.

Present law sufficiently restrictive.

1-E.14, We are, therefore, of the view that so far as the cases in which arrest may be ordered are concerned the law in India is sufficiently restrictive, except in two respects, which we shall presently discuss. This mode of execution should not, therefore, be totally abolished.

The situations mentioned in the proviso to section 51- which is the section dealing with arrest in execution of decrees for payment of money-are those which indicate fraud or clandestine designs on the part of judgment-debtor. Mere inability to perform the obligation to repay a loan (or other monetary obligation) does not result in imprisonment."

RECOVERY AND ARREST BY DRT PROCEDURE

Union of India and Anr. v. Delhi High Court Bar Association and Ors. MANU/SC/0194/2002 : (2002) 4 SCC 275, had the occasion to observe: Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Section 22 provides that the Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice and, subject to the rules framed. They shall have powers to regulate their own procedure as given to them. The Tribunal and the Appellate Tribunal under Section 22(2) are given the same powers as are vested in a civil court with regard to the

matters specified in the said sub-section which include the power of summoning and enforcing the attendance of any person and examining him on oath. While Section 25 provides for modes of recovery of debts either by attachment and sale or arrest or appointment of a receiver, Section 28 provides for modes of recovery in addition to the ones specified in Section 25. By virtue of Section 29 of the Act, the provisions of the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, have become applicable for the realization of the dues by the Recovery Officer. Detailed procedure for recovery is contained in these Schedules to the Income Tax Act, including provisions relating to arrest and detention of the defaulter. It cannot, therefore, be said that the Recovery Officer would act in an arbitrary manner. Furthermore, Section 30, after amendment by the Amendment Act, 2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal. Thus now an appellate forum has been provided against any orders of the Recovery Officer which may not be in accordance with the law. There is, therefore, sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner.

PROCEDURE OF ARREST IN INCOME TAX SECOND SCHEDULE¹

Notice to show cause.

73. (1) No order for the arrest and detention in civil prison of a defaulter shall be made unless the Tax Recovery Officer has issued and served a notice upon the defaulter calling upon him to appear before him on the date specified in the notice and to show cause why he should not be committed to the civil prison, and unless the Tax Recovery Officer, for reasons recorded in writing, is satisfied—

(a) that the defaulter, with the object or effect of obstructing the execution of the certificate, has, after the drawing up of the certificate by the Tax Recovery Officer, dishonestly transferred, concealed, or removed any part of his property, or

(b) that the defaulter has, or has had since the drawing up of the certificate by the Tax Recovery Officer, the means to pay the arrears or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

(2) Notwithstanding anything contained in sub-rule (1), a warrant for the arrest of the defaulter may be issued by the Tax Recovery Officer if the Tax Recovery Officer is satisfied, by affidavit or otherwise, that with the object or effect of delaying the execution of the

¹ <https://www.incometaxindia.gov.in/Pages/acts/income-tax-act.aspx>

certificate, the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Tax Recovery Officer.

(3) Where appearance is not made in obedience to a notice issued and served under sub-rule (1), the Tax Recovery Officer may issue a warrant for the arrest of the defaulter.

(3A) A warrant of arrest issued by a Tax Recovery Officer under sub-rule (2) or sub-rule (3) may also be executed by any other Tax Recovery Officer within whose jurisdiction the defaulter may for the time being be found.

(4) Every person arrested in pursuance of a warrant of arrest under this rule shall be brought before the Tax Recovery Officer issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey):

Provided that, if the defaulter pays the amount entered in the warrant of arrest as due and the costs of the arrest to the officer arresting him, such officer shall at once release him.

Explanation.—For the purposes of this rule, where the defaulter is a Hindu undivided family, the karta thereof shall be deemed to be the defaulter.

Detention in and release from prison.

77. (1) Every person detained in the civil prison in execution of a certificate may be so detained,—

(a) where the certificate is for a demand of an amount exceeding two hundred and fifty rupees—for a period of six months, and

(b) in any other case—for a period of six weeks:

Provided that he shall be released from such detention—

(i) on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison, or

(ii) on the request of the Tax Recovery Officer on any ground other than the grounds mentioned in rules 78 and 79.

(2) A defaulter released from detention under this rule shall not, merely by reason of his release, be discharged from his liability for the arrears; but he shall not be liable to be rearrested under the certificate in execution of which he was detained in the civil prison.

Hearing.

74. When a defaulter appears before the Tax Recovery Officer in obedience to a notice to show cause or is brought before the Tax Recovery Officer under rule 73, the Tax Recovery Officer shall give the defaulter an opportunity of showing cause why he should not be committed to the civil prison.

Custody pending hearing.

75. Pending the conclusion of the inquiry, the Tax Recovery Officer may, in his discretion, order the defaulter to be detained in the custody of such officer as the Tax Recovery Officer may think fit or release

him on his furnishing security to the satisfaction of the Tax Recovery Officer for his appearance when required.

Order of detention.

76. (1) Upon the conclusion of the inquiry, the Tax Recovery Officer may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the defaulter an opportunity of satisfying the arrears, the Tax Recovery Officer may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding 15 days, or release him on his furnishing security to the satisfaction of the Tax Recovery Officer for his appearance at the expiration of the specified period if the arrears are not so satisfied.

(2) When the Tax Recovery Officer does not make an order of detention under sub-rule (1) he shall, if the defaulter is under arrest, direct his release.

Detention in and release from prison.

77. (1) Every person detained in the civil prison in execution of a certificate may be so detained,—

(a) where the certificate is for a demand of an amount exceeding two hundred and fifty rupees—for a period of six months, and

(b) in any other case—for a period of six weeks:

Provided that he shall be released from such detention—

(i) on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison, or

(ii) on the request of the Tax Recovery Officer on any ground other than the grounds mentioned in rules 78 and 79.

(2) A defaulter released from detention under this rule shall not, merely by reason of his release, be discharged from his liability for the arrears; but he shall not be liable to be rearrested under the certificate in execution of which he was detained in the civil prison.

Arrest shall not exceed aggregate 6 months

Release.

78. (1) The Tax Recovery Officer may order the release of a defaulter who has been arrested in execution of a certificate upon being satisfied that he has disclosed the whole of his property and has placed it at the disposal of the Tax Recovery Officer and that he has not committed any act of bad faith.

(2) If the Tax Recovery Officer has ground for believing the disclosure made by a defaulter under sub-rule (1) to have been untrue, he may order the rearrest of the defaulter in execution of the certificate, but the period of his detention in the civil prison shall not in the aggregate exceed that authorised by rule 77.

Release on ground of illness.

79. (1) At any time after a warrant for the arrest of a defaulter has been issued, the Tax Recovery Officer may cancel it on the ground of his serious illness.

(2) Where a defaulter has been arrested, the Tax Recovery Officer may release him if, in the opinion of the Tax Recovery Officer, he is not in a fit state of health to be detained in the civil prison.

(3) Where a defaulter has been committed to the civil prison, he may be released therefrom by the Tax Recovery Officer on the ground of the existence of any infectious or contagious disease, or on the ground of his suffering from any serious illness.

(4) A defaulter released under this rule may be rearrested, but the period of his detention in the civil prison shall not in the aggregate exceed that authorised by rule 77.

Entry into dwelling house.

80. For the purpose of making an arrest under this Schedule—

(a) no dwelling house shall be entered after sunset and before sunrise;

(b) no outer door of a dwelling house shall be broken open unless such dwelling house or a portion thereof is in the occupancy of the defaulter and he or other occupant of the house refuses or in any way prevents access thereto; but, when the person executing any such warrant has duly gained access to any dwelling house, he may break open the door of any room or apartment if he has reason to believe that the defaulter is likely to be found there;

(c) no room, which is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, shall be entered into unless the officer authorised to make the arrest has given notice to her that she is at liberty to withdraw and has given her reasonable time and facility for withdrawing.

Prohibition against arrest of women or minors, etc.

81. The Tax Recovery Officer shall not order the arrest and detention in the civil prison of—

- (a) a woman, or
- (b) any person who, in his opinion, is a minor or of unsound mind.

Procedure on death of defaulter.

85. If at any time after the certificate is drawn up by the Tax Recovery Officer the defaulter dies, the proceedings under this Schedule (except arrest and detention) may be continued against the legal representative of the defaulter, and the provisions of this Schedule shall apply as if the legal representative were the defaulter.

Subsistence allowance.

90. (1) When a defaulter is arrested or detained in the civil prison, the sum payable for the subsistence of the defaulter from the time of arrest until he is released shall be borne by the Tax Recovery Officer.

(2) Such sum shall be calculated on the scale fixed by the State Government for the subsistence of judgment-debtors arrested in execution of a decree of a civil court.

(3) Sums payable under this rule shall be deemed to be costs in the proceeding:

Provided that the defaulter shall not be detained in the civil prison or arrested on account of any sum so payable.

Union of India and Anr. v. Delhi High Court Bar Association and Ors. MANU/SC/0194/2002 :

(2002) 4 SCC 275, had the occasion to observe: By virtue of Section 29 of the Act, the provisions of the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962, have become applicable for the realization of the dues by the Recovery Officer. Detailed procedure for recovery is contained in these Schedules to the Income Tax Act, including provisions relating to arrest and detention of the defaulter. It cannot, therefore, be said that the Recovery Officer would act in an arbitrary manner. Furthermore, Section 30, after amendment by the Amendment Act, 2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal. Thus now an appellate forum has been provided against any orders of the Recovery Officer which may not be in accordance with the law. There is, therefore, sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner.

PRESENCE OF CURRENT ABILITY TO CLEAR DEBT

Ramasamy vs. Pushpa: MANU/TN/0976/2017 ; 2017-2-LW865 Now, it is firmly settled that even in an execution petition under Order XXI Rule 37 C.P.C., simply because the decree holder wishes that the judgment debtor should be made to count the bars of a Civil prison on account of his inability to pay the decree debt, the Court could not send the debtor to jail unless he has current ability to clear off the debt or he has malafide refusal or he has some other vice or mens rea apart from his failure to foot the decree.

WHAT IS MEANT BY SUFFICIENT MEANS?

Kallancode Service Co-operative Bank vs. Philip Joseph : MANU/KE/0822/2014 ; ILR 2014 (3) Kerala 1025 "So, I am of the opinion that the expression "means" employed in clause (b) of the proviso to S. 51 of the C.P.C. includes saleable right or interest over any property also. Put it differently, the expression 'means' encompasses saleability of the property also. It cannot be confined to income from yieldings of the property only. If the judgment debtor has saleable, movable or immovable property, from which sufficient amount can be raised to satisfy the decree debt by sale of the same save as mentioned under the proviso to S. 60 of the C.P.C. it can be held that he has means to pay off the debt."

G. Sudhakara Reddy vs. Jahnavi Chit Fund Pvt. Ltd. and Ors.: MANU/AP/0395/2006 - 2006 (4)

ALT 665 Decree-holder had not produced any evidence either oral or documentary to show that judgment-debtor owned any house and that he was derived any income from that house, which would be sufficient to discharge decree debt - Hence, order of Executing Court suffered from legal infirmity and was liable to be set aside. Order 21 CPC contemplates the execution of the decree by ordering arrest of the judgment-debtor. Section 51 CPC lays down that the Court may on the application of the decree-holder. Order execution of the decree - inter alia by ordering arrest and detention in prison, where the arrest and detention is permissible. The proviso to Section 51 CPC states that where the decree is for payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing is satisfied; among other things that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects to pay the same.

In D. Viswanathan v. Karnataka Bank Ltd., MANU/KE/0065/1988 : AIR 1988 Ker 274, there was a decree for payment of money against the principal debtor and the surety both of whom were

liable jointly and severally under the transaction. In execution, both pleaded exemption from personal execution because of absence of means. The executing court ordered arrest without calling upon the decree-holder to adduce evidence on the ground that the plea of no means was not available to a surety. ... When he completely denies means it is means from all sources. What the court is concerned is whether he is having the capacity. When he denies that capacity it is to be proved by the decree-holder. The attitude taken by the execution court that the business was not specifically denied and therefore he must be held to have a business from which he is having income is not a practical approach in consonance with the object and spirit of Section 51 and Order 21, Rule 37 which are intended to see that judgment-debtors not possessed of sufficient means who did not commit any acts of mala fides envisaged in these provisions should not be detained in prison. It is too much for the execution court to say that judgment-debtor has to prove the volume of his business and its income. Solely for the reason that the business was not specifically denied even when he totally denies his income from any source. Such a burden of proof is unknown to law. The adverse inference drawn by the execution court is further more ridiculous. Even taking for granted that omission to deny existence of the business is capable of raising an inference that first defendant is having a business, does it automatically follow that the business is profitable and there is means. Can there

be a presumption that all businesses are profitable and is it possible on that basis to shift the burden which is on the decree-holder ? The answers must be in the negative. Placing burden on the judgment-debtor to prove no means is unknown to law.

WHO IS WILFUL DEFAULTER?

Kailash Shahra vs. IDBI Bank Limited:

MANU/MH/2974/2019 (DB) - The RBI Circular and which is the most relevant document has specific provisions to declare parties like the petitioner as wilful defaulter. The same has not been specifically annexed, but a copy is provided by Mr. Jain during the course of arguments. Mr. Jain says that this RBI Circular is of 9th September, 2014, but it refers to the Master Circular on Wilful Defaulters dated 1st July, 2014. The September, 2014 circular clarifies para 2.1 of the earlier circular. Now, para 2.1 as clarified on 9th September, 2014 reads as under:- "Paragraph 2.1 of the circular lists out various events when a "wilful default" would be deemed to have occurred. In view of references received from a few banks regarding scope/definition of "wilful default", it is clarified as follows:

a) The term 'lender' appearing in the circular covers all banks/FIs to which any amount is due, provided it is arising on account of any banking transaction, including off balance sheet transactions such as derivatives, guarantee and Letter of Credit.

b) The term 'unit' appearing therein has to be taken to include individuals, juristic persons and all other forms of business enterprises, whether incorporated or not. In case of business enterprises (other than companies), banks/FIs may also report (in the Director column) the names of those persons who are in charge and responsible for the management of the affairs of the business enterprise."

Para 2.6, which is amended, is also reproduced for ready reference as under:-

"Paragraph 2.6 of the circular is amended to read as follows: "While dealing with wilful default of a single borrowing company in a Group, the banks/FIs should consider the track record of the individual company, with reference to its repayment performance to its lenders. However, in cases where guarantees furnished by the companies within the Group on behalf of the wilfully defaulting units are not honoured when invoked by the banks/FIs, such Group companies should also be reckoned as wilful defaulters.""

A perusal of the same would reveal that though the term 'lender' appearing in the circular covers all banks/financial institutions to which any amount is due, it is specifically then saying that the dues must be on account of any banking transaction, including off balance sheet transactions such as derivatives, guarantee and letter of credit. The term 'unit' appearing in para 2.1 is to be taken to include individuals, juristic persons and all other forms of

business enterprises, whether incorporated or not. In case of business enterprises, other than companies, banks/financial institutions may also report the names of those persons who are in charge and responsible for the management of the affairs of the business enterprise.

Then, amended para 2.6 says that the bank should consider the track record of the individual company with reference to its repayment performance to its lenders and the guarantees furnished by the companies within the group on behalf of the wilfully defaulting units, if not honoured, then, they should also be reckoned as wilful defaulters. However, in connection with guarantors, a clarification in the parent circular is given. The clarification is that when the default is made by the principal debtor, the banker will be able to proceed against the guarantor/surety even without exhausting the remedies against the principal debtor. That is clear from section 128 of the Indian Contract Act, 1872. As such, where a banker has made a claim on the guarantor on account of the default made by the principal debtor, the liability of the guarantor is immediate. In case the said guarantor refuses to comply with the demand made by the creditor/banker, despite having sufficient means to make payment of the dues, such guarantor would also be treated as a wilful defaulter. The default, however, should occur after the date of issuance of the circular.

Now, in the main circular of 1st July, 2015, para 2.1.3 defines the "Wilful Default" and it would be

deemed to have occurred if any of the events in that para are noted. Essentially, the default is in repayment/payment obligations. The para then says that the identification of the wilful defaulter should be made keeping in view the track record of the borrowers and should not be decided on the basis of isolated transactions/incidents. The default to be categorised as wilful must be intentional, deliberate and calculated. Para 2.2 deals with diversions and siphoning of funds. It is apparent from a perusal of these paragraphs that in addition to the penal measures, the wilful defaulters must suffer the consequences following the definitions and the details set out in the ingredients of this circular. It is evident that the whole process must go by the mechanism for identification of wilful defaulters. Para 3 of the same circular reads as under:-

"3. mechanism for identification of Wilful Defaulters: The mechanism referred to in paragraph 2.5 above should generally include the following:

(a) The evidence of wilful default on the part of the borrowing company and its promoter/whole-time director at the relevant time should be examined by a Committee headed by an Executive Director or equivalent and consisting of two other senior officers of the rank of GM/DGM.

(b) if the Committee concludes that an event of wilful default has occurred, it shall issue a Show Cause Notice to the concerned borrower and the promoter/whole-time director and call for their

submissions and after considering their submissions issue an order recording the fact of wilful default and the reasons for the same. An opportunity should be given to the borrower and the promoter/whole-time director for a personal hearing if the Committee feels such an opportunity is necessary."

(c) The Order of the Committee should be reviewed by another Committee headed by the Chairman/Chairman & Managing Director or the Managing Director & Chief Executive Officer/CEOs and consisting, in addition, to two independent directors/non-executive directors of the bank and the Order shall become final only after it is confirmed by the said Review Committee. However, if the Identification Committee does not pass an Order declaring a borrower as a wilful defaulter, then the Review Committee need not be set up to review such decisions.

(d) as regard a non-promoter/non-whole time director, it should be kept in mind that Section 2(60) of the Companies Act, 2013 defines an officer who is in default to mean only the following categories of directors:

(i) whole-time director;

(ii) Where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iii) every director, in respect of a contravention of any of the provisions of Companies Act, who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings and who has not objected to the same, or where such contravention had taken place with his consent or connivance.

Therefore, except in very rare cases, a non-whole time director should not be considered as a wilful defaulter unless it is conclusively established that:

- I. he was aware of the fact of wilful default by the borrower by virtue of any proceedings recorded in the minutes of meeting of the Board or a Committee of the Board and has not recorded his objection to the same in the Minutes; or,
- II. The wilful default had taken place with his consent or connivance.

The above exception will however not apply to a promoter director even if not a whole time director.

(iv) As a one-time measure, Banks/FIs, while reporting details of wilful defaulters to the Credit Information Companies may thus remove the names of non-whole time directors (nominee directors/independent directors) in respect of whom they already do not have information about their complicity in the default/wilful default of the borrowing company. However, the names of promoter directors, even if not whole time directors, on the

board of the wilful defaulting companies cannot be removed from the existing list of wilful defaulters.

(e) A similar process as detailed in sub-paragraphs (a) to (c) above should be followed when identifying a non-promoter/non-whole time director as a wilful defaulter."

ARREST AND HUMAN DIGNITY

In Jolly George Varghese and another v. Bank of Cochin, MANU/SC/0014/1980 : (1980) 2 SCC 360,

Hon'ble Supreme Court held that unless there is proof of the minimal fairness of his willful failure to pay in spite of his sufficient means, arrest of the defaulter would be violative of Article 21 of the Constitution of India. In the present set of facts, the arrest of the petitioner No. 1 was not permissible either under the Act, 1965 or the Act, 1973 or the Code, 2006, since the petitioners are the legal representatives of the deceased borrower. Thus, from the principles laid down by Hon'ble Supreme Court in the case of Jolly George Varghese (supra), it cannot be safely inferred that when the relevant provisions itself bar arrest of a legal representatives of the deceased-borrower, then arrest of the petitioner No. 1 (legal representatives of the deceased-borrower) and his detention for 14 days in jail, is clearly violative of his fundamental rights guaranteed under Article 21 of the Constitution of India.

In Om Prakash Gupta v. State of U.P. and others, (2003) 5 AWC 4012 (Paras 10 and 13), a Division Bench of UP High Court held that keeping in mind the fundamental right of personal liberty guaranteed under Article 21 of the Constitution of India, harsh method of arrest and detention of the defaulter to coerce the defaulter to make payment should not be resorted unless the officer records his satisfaction that the defaulter inspite of having sufficient means, has willfully and with mala fide intention refused to pay.

Constitution Bench of Hon'ble Supreme Court in **K.S. Puttaswamy and others v. Union of India (U.O.I.) and others, MANU/SC/1054/2018 : (2019) 1 SCC 1** (Paras 123, 127, 135, 136, 137, 145, 145.1, 145.2, 145.3, 145.4, 145.5, 147 and 508.18 to 508.23), explained the principles of human dignity and held as under: "Principles of Human Dignity:

123. In Common Cause v. Union of India, the concept of human dignity has been explained in much detail. The concept of human dignity developed in the said judgment was general in nature which is based on right to autonomy and right of choice and it has become a constitutional value. In the last 40 years or so, this Court has given many landmark judgments wherein concept of human dignity is recognised as an attribute of fundamental rights. In the earlier years, though the meaning and scope of human dignity by itself was not expanded, this exercise has been undertaken in last few years. Earlier judgments have

mentioned that human dignity is the intrinsic value of every human being and, in the process, a person's autonomy as an attribute of dignity stands recognised. The judgments rendered in the last few years have attempted to provide jurisprudential basis to the concept of human dignity itself.

127. Next judgment in this line of cases would be that of *Jeeja Ghosh and another v. Union of India and others*, MANU/SC/0574/2016 : (2016) 7 SCC 761, wherein the court, while expanding the jurisprudential basis, outlined three models of dignity which have been discussed by us above. These were referred to while explaining the normative role of human dignity, alongside, in the following manner:

"37. The rights that are guaranteed to differently-abled persons under the 1995 Act, are founded on the sound principle of human dignity which is the core value of human right and is treated as a significant facet of right to life and liberty. Such a right, now treated as Jurisprudentially, three types of models for determining the content of the constitutional value of human dignity are recognised. These are : (i) Theological Models, (ii) Philosophical Models, and (iii) Constitutional Models. Legal scholars were called upon to determine the theological basis of human dignity as a constitutional value and as a constitutional right. Philosophers also came out with their views justifying human dignity as core human value. Legal understanding is influenced by theological and philosophical views, though these two

are not identical. Aquinas and Kant discussed the jurisprudential aspects of human dignity based on the aforesaid philosophies. Over a period of time, human dignity has found its way through constitutionalism, whether written or unwritten. Even right to equality is interpreted based on the value of human dignity. Insofar as India is concerned, we are not even required to take shelter under theological or philosophical theories. We have a written Constitution which guarantees human rights that are contained in Part III with the caption "Fundamental Rights". One such right enshrined in Article 21 is right to life and liberty. Right to life is given a purposeful meaning by this Court to include right to live with dignity. It is the purposive interpretation which has been adopted by this Court to give a content of the right to human dignity as the fulfillment of the constitutional value enshrined in Article 21. Thus, human dignity is a constitutional value and a constitutional goal. What are the dimensions of constitutional value of human dignity? It is beautifully illustrated by Aharon Barak (former Chief Justice of the Supreme Court of Israel) in the following manner : "The constitutional value of human dignity has a central normative role. Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways : first, the value of human dignity serves as a normative basis for constitutional rights set out in the Constitution;

second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right.".....38. All the three goals of human dignity as a constitutional value are expanded by the author in a scholarly manner. Some of the excerpts thereof, are reproduced below which give a glimpse of these goals: "The first role of human dignity as a constitutional value is expressed in the approach that it comprises the foundation for all of the constitutional rights. Human dignity is the central argument for the existence of human rights. It is the rationale for them all. It is the justification for the existence of rights. According to Christoph Enders, it is the constitutional value that determines that every person has the right to have rights. The second role of human dignity as a constitutional value is to provide meaning to the norms of the legal system. According to purposive interpretation, all of the provisions of the Constitution, and particularly all of the rights in the constitutional bill of rights, are interpreted in light of human dignity. Lastly, human dignity as a constitutional value influences the development of the common law. Indeed, where common law is recognised, Judges have the duty to develop it, and if necessary, modify it, so that it expresses constitutional values, including the constitutional value of human dignity. To the extent that common

law determines rights and duties between individuals, it might limit the human dignity of one individual and protect the human dignity of the other."

135. As per Dworkin, there are two principles about the concept of human dignity. First principle regards an "intrinsic value" of every person, namely, every person has a special objective value, which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. It can also be described as self respect which represents the free will of the person, her capacity to think for herself and to control her own life. The second principle is that of "personal responsibility", which means every person has the responsibility for success in her own life and, therefore, she must use her discretion regarding the way of life that will be successful from her point of view.

136. Sum total of this exposition is well defined by Professor Baxi by explaining that as per the aforesaid view, dignity is to be treated as "empowerment" which makes a triple demand in the name of "respect" for human dignity, namely:

- (i) respect for one's capacity as an agent to make one's own free choices;
- (ii) respect for the choices so made; and
- (iii) respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

137. In this entire formulation, "respect" for an individual is the fulcrum, which is based on the

principle of freedom and capacity to make choices and a good or just social order is one which, respects dignity via assuring "contexts" and "conditions" as the "source of free and informed choice".

145. When we read socioeconomic rights into human dignity, the community approach also assumes importance alongwith individualistic approach to human dignity. It has now been well recognised that at its core, human dignity contains three elements, namely, intrinsic value, autonomy and community value. These are known as core values of human dignity. These three elements can assist in structuring legal reasoning and justifying judicial choices in "hard cases". It has to be borne in mind that human dignity is a constitutional principle, rather than free standing fundamental rights. Insofar as intrinsic value is concerned, here human dignity is linked to the nature of being. We may give brief description of these three contents of the idea of human dignity as below:

(I) Intrinsic Value:

145.1. The uniqueness of human kind is the product of a combination of inherent traits and features--including intelligence, sensibility, and the ability to communicate--that give humans a special status in the world, distinct from other species. The intrinsic value of all individuals results in two [See George Kateb, Human Dignity (2011) ("[W]e can distinguish between the dignity of every basic postulates : anti-utilitarian and anti-authoritarian. The former consists of the formulation of Kant's categorical imperative that

every individual is an end in him or herself, not a means for collective goals or the purposes of others. The latter is synthesized in the idea that the State exists for the individual, not the other way around. As for its legal implications, intrinsic value is the origin of a set of fundamental rights. The first of these rights is the right to life, a basic precondition for the enjoyment of any other right. A second right directly related to the intrinsic value of each and every individual is equality before and under the law. All individuals are of equal value and, therefore, deserve equal respect and concern. This means not being discriminated against due to race, colour, ethnic or national origin, sex, age or mental capacity (the right to non-discrimination), as well as respect for cultural, religious, or linguistic diversity (the right to recognition). Human dignity fulfills only part of the content of the idea of equality, and in many situations it may be acceptable to differentiate among people. In the contemporary world, this is particularly at issue in cases involving affirmative action and the rights of religious minorities. Intrinsic value also leads to the right to integrity, both physical and mental. The right to physical human individual and the dignity of the human species as a whole."). Integrity includes the prohibition of torture, slave labour, and degrading treatment or punishment. Discussions on life imprisonment, interrogation techniques, and prison conditions take place within the scope of this right. The right to mental integrity comprises the right to

personal honour and image and includes the right to privacy.

(II) Autonomy:

145.2. Autonomy is the ethical element of human dignity. It is the foundation of the free will of individuals, which entitles them to pursue the ideals of living well and having a good life in their own ways. The central notion is that of self-determination : An autonomous person establishes the rules that will govern his or her life. Kantian conception of autonomy is the will governed by the moral law (moral autonomy). Here, we are concerned with personal autonomy, which is value neutral and means the free exercise of the will according to one's own values, interests, and desires. Autonomy requires the fulfillment of certain conditions, such as reason (the mental capacity to make informed decisions), independence (the absence of coercion, manipulation and severe want), and choice (the actual existence of alternatives). Autonomy, thus, is the ability to make personal decisions and choices in life based on one's conception of the good, without undue external influences. As for its legal implications, autonomy underlies a set of fundamental rights associated with democratic constitutionalism, including basic freedoms (private autonomy) and the right of political participation (public autonomy).

145.3. It would be pertinent to emphasise here that with the rise of the welfare state, many countries in the world (and that includes India) also consider a

fundamental right to minimum living conditions (the existential minimum) in the balancing that results into effective autonomy. Thus, there are three facets of autonomy, namely : private autonomy, public autonomy and the existential minimum. Insofar as the last component is concerned, it is also referred to as social minimum or the basic right to the provision of adequate living conditions has its roots in right to equality as well. In fact, equality, in a substantive sense, and especially autonomy (both private and public), are dependent on the fact that individuals are "free from want," meaning that their essential needs are satisfied. To be free, equal, and capable of exercising responsible citizenship, individuals must pass minimum thresholds of well-being, without which autonomy is a mere fiction. This requires access to some essential utilities, such as basic education and health care services, as well as some elementary necessities, such as food, water, clothing, and shelter. The existential minimum, therefore, is the core content of social and economic rights. This concept of minimum social right is protected by the court, time and again.

(III) Community Value:

145.4. This element of human dignity as community value relates to the social dimension of dignity. The contours of human dignity are shaped by the relationship of the individual with others, as well as with the world around him. English poet John Donne expresses the same sentiments when he says "no man

is an island, entire of itself. The individual, thus, lives within himself, within a community, and within a state. His personal autonomy is constrained by the values, rights, and morals of people who are just as free and equal as him, as well as by coercive regulation. Robert Post identified three distinct forms of social order : community (a "shared world of common faith and fate"), management (the instrumental organisation of social life through law to achieve specific objectives), and democracy (an arrangement that embodies the purpose of individual and collective self-determination. These three forms of social order presuppose and depend on each other, but are also in constant tension.

145.5. Dignity as a community value, therefore, emphasises the role of the state and community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of the good life. The relevant question here is in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy? The liberal predicament that the state must be neutral with regard to different conceptions of the good in a plural society is not incompatible, of course, with limitation resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an "overlapping consensus" that can be shared by most individuals and groups. Whenever such tension

arises, the task of balancing is to be achieved by the courts.

Doctrine of Proportionality:

147. As noted above, whenever challenge is laid to an action of the State on the ground that it violates the right to privacy, the action of the State is to be tested on the following parameters:

- (a) the action must be sanctioned by law;
- (b) the proposed action must be necessary in a democratic society for a legitimate aim; and
- (c) the extent of such interference must be proportionate to the need for such interference.

508.18. As per Dworkin, there are two principles about the concept of human dignity, First principle regards an "intrinsic value" of every person, namely, every person has a special objective value which value is not only important to that person alone but success or failure of the lives of every person is important to all of us. It can also be described as self respect which represents the free will of the person, her capacity to think for herself and to control her own life. The second principle is that of "personal responsibility", which means every person has the responsibility for success in her own life and, therefore, she must use her discretion regarding the way of life that will be successful from her point of view.

508.19. Sum total of this exposition can be defined by explaining that as per the aforesaid view dignity is to be treated as "empowerment" which makes a triple

demand in the name of "respect" for human dignity, namely:

508.19.1 Respect for one's capacity as an agent to make one's own free choices;

508.19.2. Respect for the choices so made; and

508.19.3. Respect for one's need to have a context and conditions in which one can operate as a source of free and informed choice.

508.20. In the entire formulation of dignity right, "respect" for an individual is the fulcrum, which is based on the principle of freedom and capacity to make choices and a good or just social order is one which respects dignity via assuring "contexts" and "conditions" as the "source of free and informed choice". The aforesaid discourse on the concept of human dignity is from an individual point of view. That is the emphasis of the petitioners as well. That would be one side of the coin. A very important feature which the present case has brought into focus is another dimension of human dignity, namely, in the form of "common good" or "public good". Thus, our endeavour here is to give richer and more nuanced understanding to the concept of human dignity.

508.21. We, therefore, have to keep in mind humanistic concept of Human Dignity which is to be accorded to a particular segment of the society and, in fact, a large segment. Their human dignity is based on the socio-economic rights that are read in to the Fundamental Rights as already discussed above. When we read socio-economic rights into human

dignity, the community approach also assumes importance alongside individualistic approach to human dignity. It has now been well recognised that at its core, human dignity contains three elements, namely, Intrinsic Value, Autonomy and Community Value. These are known as core values of human dignity. These three elements can assist in structuring legal reasoning and justifying judicial choices in "hard cases".

508.22. When it comes to dignity as a community value, it emphasises the role of the community in establishing collective goals and restrictions on individual freedoms and rights on behalf of a certain idea of good life. The relevant question here is in what circumstances and to what degree should these actions be regarded as legitimate in a constitutional democracy? The liberal predicament that the State must be neutral with regard to different conceptions of the good in a plural society is not incompatible, of course, with limitation resulting from the necessary coexistence of different views and potentially conflicting rights. Such interferences, however, must be justified on grounds of a legitimate idea of justice, an "overlapping consensus" that can be shared by most individuals and groups. Whenever such tension arises, the task of balancing is to be achieved by the courts.

508.23. We would like to highlight one more significant feature which the issues involved in the present case bring about. It is the balancing of two

facets of dignity of the same individual. Whereas, on the one hand, right of personal autonomy is a part of dignity (and right to privacy), another part of dignity of the same individual is to lead a dignified life as well (which is again a facet of Article 21 of the Constitution). Therefore, in a scenario where the State is coming out with welfare schemes, which strive at giving dignified life in harmony with human dignity and in the process some aspect of autonomy is sacrificed, the balancing of the two becomes an important task which is to be achieved by the courts. For, there cannot be undue intrusion into the autonomy on the pretext of conferment of economic benefits."

MERE INABILITY TO RETURN LOAN AMOUNT IS NOT CHEATING

Satishchandra Ratanlal Shah vs. State of Gujarat and Ors. : MANU/SC/0199/2019 - AIR 2019 SC 1538 - Mere inability of Appellant to return loan amount could not give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention was shown right at beginning of transaction, as it was this mens rea which was crux of offence. Even if all facts in complaint and material were taken on their face value, no such dishonest representation or inducement could be found or inferred.

**SEVERAL UNHEALTHY PRACTICES KEPT OPEN
FOR FURTHER ADJUDICATION IN 2001 - BY
CONSTITUTION BENCH OF SC**

Central Bank of India vs. Ravindra and Ors.:
MANU/SC/0663/2001 - AIR 2001 SC 3095 -During

the course of hearing it was brought to our notice that in view of several Usury Laws and Debt Relief Laws in force in several States private money lending has almost come to an end and needy borrowers by and large depend on banking institutions for financial facilities, Several unhealthy practices heaving slowly penetrated into prevalence were pointed out. Banking is an organised institution and most of the banks press into service long running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein, and bind themselves by the stipulations articulated by best of legal brains. Borrowers other than those belonging to corporate sector, find themselves having unwittingly fallen into a trap and rendered themselves liable and obliged to pay interest the quantum whereof may at the end prove to be ruinous. At times the interest charged and capitalised is manifold than the amount actually advanced. Rule of damdupat does not apply. Penal interest, service charges and other over-heads are debited in the account of the borrower and capitalised of which debits the borrower may not even be aware. If the practice of charging interest on quarterly rests is upheld and given a judicial

recognition, unscrupulous banks may resort to charging interest even on monthly rests and capitalising the same. Statements of Accounts supplied by banks to borrowers many a times do not contain particulars or details of debit entries and when written in hand are worse than medical prescriptions putting to test the eyes and wits of the borrowers. Instances of unscrupulous, unfair and unhealthy dealings can be multiplied though they cannot be generalised. Suffice it to observe that such issues shall have to be left open to be adjudicated upon in appropriate cases as and when actually arising for decision and we cannot venture into laying down law on such issues as do not arise for determination before us. However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under:-

(1) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest, i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy.

(2) Novation, that is, a debtor entering into a fresh agreement with creditor undertaking payment of

previously borrowed principal amount coaled with interest by treating the sum total as principal, any contract express or implied and an express acknowledgement of accounts, are best evidence of capitalisation. Acquiescence in the method of accounting adopted by the creditor and brought to the knowledge of the debtor may also enable interest being converted into principal. A mere failure to protest is not acquiescence.

(3) The prevalence of banking practice legitimize stipulations as to interest on periodical rests and their capitalisation being incorporated in contracts. Such stipulations incorporated in contracts voluntarily entered into and binding on the parties shall govern the substantive rights and obligations of the parties as to recovery and payment of interest.

(4) Capitalisation method is founded on the principle that the borrower failed to make payment though he could have made and thereby rendered himself a defaulter. To hold an amount debited to the account of the borrower capitalised it should appear that the borrower had an opportunity of making the payment on the date of entry or within a reasonable time or period of grace from the date of debit entry or the amount falling due and thereby avoiding capitalisation. Any debit entry in the account of the borrower and claimed to have been capitalised so as to form an amalgam of the principal sum may be excluded on being shown to the satisfaction of the Court that such debit entry was not brought to the

notice of the borrower and/or he did not have the opportunity of making payment before capitalisation and thereby excluding its capitalisation.

(5) The power conferred by Section 21 and 35A of the Banking Regulation Act, 1935 is coupled with duty to act. Reserve Bank of India is prime banking institution of the country entrusted with a supervisory role over banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy.

(6) Agricultural borrowings are to be treated on a pedestal different from others. Charging and capitalisation of interest on agricultural loans cannot be permitted in India except on annual or six monthly rests depending on the rotation of crops in the area to which the agriculturist borrowers belong.

(7) Any interest charged and/or capitalised in violation of RBI directives, as to rate of interest, or as to periods at which rests can be arrived at, shall be disallowed and/or excluded from capital sum and be treated only as interest and dealt with accordingly.

(8) Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC de hors ? the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.

In view of the law having been settled with this judgment, it is expected henceforth from the banks, bound by the directives of the Reserve Bank of India, to make an averment in the plaint that interest/compound interest has been charged at such rates, and capitalised at such periodical rests, as are

permitted by, and do not run counter to, the directives of the Reserve Bank of India. A statement of account shall be filed in Court showing details and giving particulars of debit entries, and if debit entry relates to interest then setting out also the rate of, and the period for which, the interest has been charged, On the Court being prima facie satisfied, if a dispute is raised in that regard, of the permissibility of debits, the onus would be on the borrower to show why the amount of debit balance appearing at the foot of the account and claimed as principal sum cannot be so accepted and adjudged. This practice would narrow down the scope of controversy in suits filed by banking institutions and enable an expeditious disposal of the suits, the issues wherein are by and large capable of being determined by documentary evidence. RBI directives have not only statutory flavour, any contravention thereof or any default in compliance therewith is punishable under sub-section (4) of Section 46 of Banking Regulation Act, 1949. The Court can act on assumption that transactions or dealings have taken place and accounts maintained by banks in conformity with RBI directives.

WHEN LENDER DOES NOT APPROACH WITH CLEAN HANDS

Supreme Court in the case of John K. John vs. Tom Varghese and another, reported in MANU/SC/8039/2007 : JT 2007 (13) SC 222 has held as under:- "10. The High Court was entitled to

take notice of the conduct of the parties. It has been found by the High Court as of fact that the complainant did not approach the court with clean hands. His conduct was not that of a prudent man. Why no instrument was executed although a huge sum of money was allegedly paid to the respondent was a relevant question which could be posed in the matter. It was open to the High Court to draw its own conclusion therein. Not only no document had been executed, even no interest had been charged. It would be absurd to form an opinion that despite knowing that the respondent even was not in a position to discharge his burden to pay instalments in respect of the prized amount, an advance would be made to him and that too even after institution of three civil suits. The amount advanced even did not carry any interest. If in a situation of this nature, the High Court has arrived at a finding that the respondent has discharged his burden of proof cast on him under Section 139 of the Act, no exception thereto can be taken. "

NO ILLEGAL TRANSACTIONS CAN BE UPHELD BY COURTS

Supreme Court in the case of G. Pankajakshi Amma vs. Mathai Mathew (Dead) Through LRs. MANU/SC/1158/2004 : (2004) 12 SCC 83. no unaccounted transaction, which is illegal per se, can be upheld by the court. no court can come to

the aid of a party in an illegal transaction; it was settled law that in such cases, the loss must be allowed to lie where it falls."If these are unaccounted transactions then they are illegal transactions. No. court can come to the aid of the party in an illegal transaction. It is settled law that in such cases the loss must be allowed to lie where it falls. In this case as these are unaccounted transactions, the Court could not have lent its hands and passed a decree. For these reasons also the suit was required to be dismissed."

CHAPTER-2

MONEY LENDING AND CHITS

MONEY LENDING AND LICENCE

Surendra Kumar Jain vs. Kamala Narayana Reddy and Ors. HIGH COURT OF KARNATAKA AT BENGALURU - R.F.A. No. 1681 of 2014 - MANU/KA/7830/2019 - In H.R. Halappa and others Vs. H. Devaraju reported in MANU/KA/0387/2008 : I.L.R. 2008 Kar. 5175, this Court had an opportunity to discuss the interpretation of Section 11 of the K.M.L. Act and to consider whether 'business' and 'profession' are one and the same or do they differ. After analysing the case and also examining the definition of Section 2(10) of the K.M.L. Act, in the light of Section 11 of the same Act, this Court had observed that a 'business' as contemplated under the said Act is different from 'profession', as such, they cannot be equated. It said, in order to call a person a businessman doing 'business', it must be shown that he should have engaged in the 'business of money lending' under the Act. With the said analysis of Section 2(10) of the K.M.L. Act, the Court finally held that, no Court shall pass a decree in favour of a money lender in any suit to which the Act applies, unless the Court is satisfied that, at the time the loan or any part of it was advanced, the money lender held a valid licence. The said judgment leads to an inference that a person who lends money subsequent to the K.M.L. Act coming into

force, as a money lender should necessarily have a money lenders licence as required under Section 11 of the same Act and if he has any such licence only as at the time of the loan, he can be a licenced money lender and recover the money by instituting a suit under Section 2(19) of the said Act. In the case on hand, the contention of the appellant/plaintiff is that, the plaintiff was not a person doing business' in money lending as on the date of the loan transaction. As such, for a stray transaction, the act of the person cannot be called as a person doing business' in money lending.

In **M.N. Radhamma Vs. M.N. Venkatanarayanappa reported in MANU/KA/0148/1979 : I.L.R. 1979 Kar. 2138.** - In this case, Co-ordinate Bench of this Court in para-4 of its judgment was pleased to observe that, in order to hold a person to be a money lender, he or she must carry on a 'business' in money lending in the State. To regard an activity as a 'business', there must be a course of dealings carried on with a profit motive. Thus, it must be established that the person carrying on the activity of money lending as a business' with a profit motive. It was further observed in the same judgment that, the expression 'carries on the business of money lending' occurring in Section 2(10) of the Act makes it clear that, a mere stray instance of money lending cannot be taken as a proof of establishment of the fact of carrying on the "business of money lending.

Shekarappa vs. Mahadevappa: MANU/KA/ 0026/

2015 - After considering the pleadings and on evaluation of available evidence, both oral and documentary, trial court dismissed the suit on the ground that plaintiff is a money lender and he had not obtained licence from the appropriate authority as required under Section 11 of the Karnataka Money Lenders Act and evidence on record also disclosed that plaintiff had granted loans to several other persons and as such, plaintiff being a money lender and not having obtained licence as required under Section 11 of the Karnataka Money Lenders Act, he would not be entitled to seek recovery of the amount and as such, the Trial Court arrived at a conclusion that plaintiff has not complied with Sections 20 and 21 of the Karnataka Money Lenders Act. plaintiff he himself has clearly admitted by filing petition in one of the suit stating that he has made several loan transactions that several defendants for which he had already filed various suits and Small Cause before this court through various Advocates. So, I am of the opinion that, the plaintiff has not at all proved Ex. P-1 document by any cogent evidence. So, in the present case when the plaintiff has not at all complied Sec. 20 or 21 of the Karnataka Money Lenders Act then even though plaintiffs claim is established he cannot get the decree in his favour." In view of above admission made by plaintiff and also the fact that plaintiff was unable to demonstrate that he is

possessing a valid money lending licence, Trial Court was justified in arriving at a conclusion that suit in question was not maintainable and plaintiff was not entitled for the decree in the absence of any other independent evidence to establish the fact that plaintiff was not a money lender. This Court would have definitely entertained the claim of the plaintiff had he taken a plea that loan transaction is a solitary transaction and there was no other transaction. However, in the absence of said plea or evidence, finding arrived at by the Trial Court in dismissing the suit cannot be faulted with.

Prasanna and Company, Bangalore vs. Prasanna Kumar and Ors. 2000 (5) Kar LJ 166: MANU/KA/0350/2000 - 14. As per the requirement of this section, (Section 11) the money-lender must have a valid licence and he should satisfy the Court that he has got a valid money-lenders licence under the Act at the time of advancing of the loan or part of the loan to which the suit relates and also he must establish that he held a valid licence on the date when he filed the suit, that unless and until it is established to the satisfaction of the Court that on both occasions viz., the time and date on which the loan or any part thereof was advanced which is the subject-matter of the suit and on the date of filing of the suit, the money-lender did have a valid money-lending licence under the Act, the mandate of law to the Court is that no decree shall be passed by it in favour of a money-

lender in any suit to which this Act applies. 15. In the present case, Ext. P-1 which has been filed by the appellant-plaintiff in proof of the licence reveals that the appellant-plaintiff held a valid licence which was valid upto 31st December, 1987. The transaction of loan as alleged by the appellant-plaintiff had taken place on 22-2-1988. No doubt, Ext. P-11 which is on record reveals that the appellant-plaintiff had moved the application for the renewal of licence before the expiry of the term mentioned in Ext. P-1. Under the law as operative under Section 10 of the Karnataka Money Lenders Act, 1961 in the year 1988 vide proviso to Section 10 of the Act and the legal fiction contained thereunder, he shall be deemed to have a valid licence until orders are received by him on his application for the fresh licence and he will be deemed to have been carrying on the business of money-lending under a valid licence during the succeeding year and till the receipt of a fresh licence. Applying this legal fiction, in my opinion, the Trial Court rightly held that as on the date of alleged transaction of loan and hire-purchase agreement, the appellant-plaintiff is to be deemed to have a valid licence and that was valid only for the period i.e., upto 31-12-1988. But so far as on the date of the filing of the suit i.e., 19-1-1989 is concerned, the appellant-plaintiff did not and could not produce the documentary evidence before the Court to show that he held a valid licence even on the date of filing of the suit. There is nothing on record to establish or show that on the date of filing of the suit, the

appellant-plaintiff had a valid money-lenders licence issued under Section 7 of the Karnataka Money Lenders Act, 1961. This being the factual position and no valid licence or no documentary evidence of a valid licence on the date of the suit i.e., 19-1-1989 .having been established, in my opinion, the Trial Court rightly held that there has been non-compliance with the provisions of Section 11 of the Karnataka Money Lenders Act, 1961. As the appellant-plaintiff had failed to prove that he had a valid moneylenders licence on the date of the suit being filed, the Court below had to follow the mandate of law which he did and the mandate has been that no Court shall pass a decree in favour of a money-lender in any suit to which this Act applies. There is no dispute to the position that the Karnataka Money Lenders Act, 1961 was applicable. In this view of the matter, in my opinion, the Trial Court did not commit any error either on fact or law in dismissing the suit as per the language of Section 11 of the Karnataka Money Lenders Act, 1961.

K. Lakshmipathy vs. Channaiah: ILR 1996 KAR 3351 - MANU/KA/0499/1996 - Section 11 of the Money-Lenders Act reads as follows:- "After the expiry of six months from the date on which this Act comes into force, no Courts shall pass a decree in favour of a money lender in any suit to which this Act applies, filed by a money-lender, unless the Court is satisfied that the time when the loan or any part thereof to

which the suit relates was advanced (and on the date such suit was filed) the money lender held a license."

The opening clause of the Section starts with the words 'no Court shall pass a decree and it is incumbent as per the provisions of that Section that the Court has to be satisfied that at the time when the loan or any part thereof was advanced as also on the date when the suit was filed, the plaintiff was in possession of a valid money lender's licence. There is a bar to the Court passing of a decree in the absence of the production of this document on a scrutiny of which alone the Court can arrive at the conclusion that the plaintiff did possess a valid licence. It is quite apart from the provisions of the Section which are explicit. I need to point out that the law as engrafted in this provision is statutory rule for the reason that where it is a money lending transaction, a 'valid' licence is a condition precedent. The Section uses the word valid and not merely the word 'licence' which pre-supposes the fact that the Court has to be satisfied about the validity of that document. It means that the mere production is not sufficient. In addition to this, the scheme of the law is that the document must be on record when the decree is passed and it is also equally necessary that the licence must be tendered in evidence giving the opposite party an opportunity of challenging it. Courts did come across situations where documents other than valid ones are sought to be produced and therefore comes the stage of scrutiny. If the plaintiff produces a document

claiming it to be a valid one, the learned Advocate appearing on the other side will scrutinise it and will possibly cross-examine the plaintiff in order to establish that the document is valid. These are necessary procedures that have to be gone through in the course of the trial and in the absence of these procedures, one cannot argue that mere production of some document in the Court office after passing of the decree is sufficient compliance with the mandatory requirements. It is not a question of being technical but to my mind, the requirement has certain valid justifications and in the absence of the procedures that I have outlined being complied with, there would arise a total legal bar to the Court passing a decree. I have already indicated that the production is condition precedent meaning that in the absence thereof a Court cannot pass a decree.

**K.G. Srinivas and Ors. vs. Akshaya Financiers:
2012 (1) Kar LJ 218 - MANU/KA/1290/2011**

18. Before discussing the facts relating to the case on hand, applicability or otherwise of the judgment relied upon by the learned Counsel for appellate is discussed herein below. In the case of Lakshmipathy v. Channaiah, ..., (ILR 1996 KAR 3351 - MANU/KA/0499/1996), Plaintiff did not produce money lending license before the Trial Court. This initial bar as seen from Section 11 of the Karnataka Money Lenders Act was found to be glaring in the said suit. In spite of the same, Trial Court decreed the suit with rider by

holding that Plaintiff would be at liberty to produce the Money Lenders License, before drawing up of the decree or otherwise suit to be treated as dismissed. In actual words as discussed by this Court in Lakshmipathy v. Channaiah case, it reads as under: This point had arisen in the course of the proceedings and the learned Trial Judge has passed a very peculiar order whereunder he has decreed the suit. He has however directed the Plaintiff to produce the licences in question failing which, the decree was not be drawn up and the suit was to be treated as having been dismissed.

Thus, it emerges from the above judgment that, license was not produced and inspite of non-production, suit came to be decreed with a rider and hence, this Court applied Section 11 of the Karnataka Money Lenders Act 1961, to the facts therein and held that, this initial bar was not cleared and as such, suit could not have been decreed and in exercise of its revisional jurisdiction, judgment and decree of Trial Court came to be set aside.

In the instant case, it is the Appellate Court in exercise of its power, under Order 41, which it exercises as continuation of original proceedings decreed the suit by taking into consideration, the Money Lenders License produced before it,

A reading of Section 11 of the Karnataka Money Lenders Act, would go to show that, no Court, shall pass decree in favour of a money lender in any suit, to which this Act applies, filed by a money lender, unless

the Court is satisfied that, at the time, when the loan or any part thereof to which the suit, relates was advanced and on the date of such suit was filed, the money lenders was holding a license. In effect, Court, ie, referred Under Section 11 of the Karnataka Money Lenders Act, would not only mean and include Trial Court but also includes the Appellate Court. Hence, such restrictive meaning cannot be given to the word 'court' as found in Section 11 of the Act so as to exclude the powers of the 'Appellate Court'. A reading of said section in its entirety would go to show that words used therein is that 'no court' should pass a decree in favour of a money lender in any suit filed by a money lender to which the act applies unless such Court is satisfied that such Money Lender had a valid Money Lending Licence. The word 'no court' would mean and include the "Appellate Court" also. At this juncture it would be of benefit to extract Sub-section (2) of Section 107 of Code of Civil Procedure which reads as under:

107. Powers of Appellate Court -

- (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power...
- (2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the code Courts of original jurisdiction in respect of suits instituted therein.

Thus, appellate Court will have the same power as that of the Court exercising original jurisdiction

which includes decreeing a suit. As such, it cannot be held or construed that court referred to Under Section 11 of the Act does not mean and include Appellate Court. In view of the same, contention of the learned Counsel appearing for Appellant cannot be accepted.

One another factor which requires to be noticed is that the court which passes the decree has to be satisfied that at the time when the ban or any part thereof to which the suit relates was advanced and on the date on which such a suit was filed, the money lender held a valid licence. This satisfaction is to be arrived at by the court which passes the decree. In effect, Plaintiff/ Appellant has to demonstrate that as on the date of lending of the money and as on the date of filing of the suit Plaintiff possessed a valid money lenders licence. As such, the Plaintiff or the Appellant as the case be would be entitled to demonstrate the same before the appellate court that Plaintiff possessed a valid Money Lending license and if the said Court is satisfied about the same then such Court would be empowered to pass a decree. In other words once, such evidence is placed, it is for the court to form its opinion about the satisfaction it wants to arrive at Question of rebuttal evidence by the Defendant does not arise if no doubt arises,

In the instant case, lower Appellate Court, in exercise of its power under Order 41, which is in continuation of the original jurisdictional power has taken note of the fact that, Plaintiff had money lending license, as on the date of advancing loan and also on

the date of filing of the suit and accordingly decreed the suit. The decree that has been passed is by the Appellate Court. It is this Appellate Court, which passes the decree, which will have to be satisfied about Plaintiff possessing money lending license as on date of advancing the loan and date of suit. It is this precise exercise, which was done by Lower Appellate Court, after Plaintiff/ Appellant produced the licence. Hence, judgment relied upon by learned Counsel for Defendant to contend that, money lending license subsequently produced to cure the alleged defect cannot be accepted and as such arguments advanced by learned Counsel for Defendants does not hold merit and it stands rejected.

In view of the discussion made herein above and in the facts of the present case, it is noticed that, lower Appellate Court had received initially the true copies and later original money lending license produced by the Plaintiff found that as on date of suit transaction and also as on the date of filing of the suit, Plaintiff had valid money lending license and decreed the suit.

Nagaraju vs. M. Mahadevaiah: MANU/KA/8613

/2019 - 3. The plaintiff filed the suit for recovery of a sum of Rs. 1,45,900/- with interest at 12% p.a. It is stated that the plaintiff and defendant knew each other. In the month of October 2005, at the request of defendant and for his legal necessities, the plaintiff

had lent a sum of Rs. 1,15,000/- in cash to the defendant. The defendant executed an on demand pronote, promising to repay the said amount along with interest at the rate of 12% p.a. Further, during October 2007 it is stated that the plaintiff was in need of money and the plaintiff orally demanded the defendant to repay the said loan amount with interest at 12% p.a. But, the defendant failed to pay the same. Hence, the plaintiff got issued a legal notice dated 30.10.2007 demanding the payment of loan amount. In spite of legal notice, the defendant failed to make payment which resulted in filing of the suit for recovery of money.

4. The defendant on service of suit summons filed written statement denying the plaint averments and also denying the loan transaction between the plaintiff and the defendant.

7. The trial Court recorded a finding that the plaintiff had indulged in financial transaction with several persons and the plaintiff who is a Government servant had not filed returns to the Department as required under law, with regard to the loan advanced to the defendant. Thus, dismissed the suit of the plaintiff.

8. The First Appellate Court dismissed the appeal.

9. Under Section 100 of CPC, the second appeal would be maintainable only if the appeal involves any substantial question of law. In the instant case, no substantial question of law would arise for

consideration. The plaintiff is before this Court against the concurrent finding of fact by the trial Court as well as the Appellate Court. The trial Court had framed the issue with regard to whether the plaintiff proves that on 13.10.2005, the defendant had availed loan of Rs. 1,15,000/-. The said issue has been answered in the negative. The trial Court has specifically recorded a finding that the appellant has not shown transaction in the annual returns in respect of the amount lent to the defendant. It has also recorded a finding that the plaintiff had financial transactions not only with the defendant but with several other persons. On the material available on record, the trial Court has come to the conclusion that there is cloud of doubt in the transaction between the plaintiff and defendant and has come to the conclusion that the transaction between the plaintiff and defendant is an illegal transaction and against the public policy. The plaintiff being a Government servant could not have entered into a financial transaction with the defendant.

10. The First Appellate Court based on the evidence on record confirmed the judgment and decree passed by the trial Court. The Appellate Court was of the view that the plaintiff has to prove his case on the strength of his own evidence which the plaintiff has failed to do. The Appellate Court has also observed that the plaintiff has to prove that as on 13.10.2005, he had money to lend to the defendant, which he has failed to prove. The First Appellate Court was also of the

opinion that the transaction, was without any license, which is required as per Section 5 of the Karnataka Money Lenders Act, 1961. Thus, I am of the view that no substantial question of law would arise for consideration in this appeal.

In H.R. Halappa and others Vs. H. Devaraju reported in MANU/KA/0387/2008 : I.L.R. 2008 Kar. 5175,

23. Therefore, the evidence on the whole and in particular the admission of P.W. 1 itself is sufficient to draw the inference that the plaintiff had been in the business of money-lending for several years and he even goes on to admit that he advanced loan of Rs. 50,000/- to several persons and collected the amount with interest and also admit that he did not possess any licence as required under the Act.

24. In the face of the aforesaid evidence, the lower appellate court has arrived at the conclusion that it has been established from the evidence on record that the plaintiff had been engaged in the money-lending business with several persons. The said finding of the lower appellate court is in accordance with the above evidence placed on record by the parties themselves. As such, I see no perversity of finding in the view taken by the lower appellate court.

25. As the plaintiff was not possessing any valid licence as required under the Act, Section 11 of the said Act comes into operation and the said Section

provides that, after the expiry of six months from the date of coming into force of the said Act, no court shall pass decree in favour of a money-lender in any suit to which the Act applies unless the court is satisfied that at the time the loan or any part of it was advanced, the money-lender held a valid licence.

26. As the plaintiff did not possess a valid licence as required under Section 11 of the Act, the trial court could not have decreed the suit of the plaintiff. The lower appellate court has rightly set aside the judgment of the trial court by dismissing the suit of the plaintiff.

Surendra Kumar Jain vs. Kamala Narayana Reddy and Ors. HIGH COURT OF KARNATAKA AT BENGALURU - R.F.A. No. 1681 of 2014 - MANU/KA/7830/2019

23. A careful reading of the very same portion of the evidence of the plaintiff which is extracted above would clearly go to show that, neither in his pleading nor in his evidence, the plaintiff has stated that as on the date of the loan transaction which was on 11-02-2004, he was doing money lending business. Even in his cross-examination which was recorded on 19-02-2013, he has not stated that as on the date of loan transaction, he was a money lender by 'business'. He has only stated that he does money lending business and that he has got a money lender's licence. The said statement was made by the witness on 19-02-2013. Since the said statement made by the witness with

regard to his present avocation which was on 19-02-2013, that cannot be given a back date as on 11-02-2004 to hold that since then, he was doing money lending business, as the same is not the inference which the said statements of the witness leads any one. Further, the evidence of PW-1 in C.C. No. 3553/2007, through Ex. D-15 which has been produced and relied upon by none else than the defendants themselves in the Court below would go to show that the plaintiff as a complainant in the said case has clearly stated that, from 1988 upto 2004, he was doing business in cloths. Thereafter, he was doing electrical and money lending business and real estate brokership. Though it was not confronted to PW-1 in his cross-examination in the original suit, still, taken as the statement of the witness, it clearly shows that he has made it clear that his business upto the year 2004 was only business in clothing. It is only thereafter, along with the electrical and real estate brokership, he started the money lending business also.

24. The case of the plaintiff on hand is that the loan transaction has taken place on 11-02-2004, that means in a period where he had not yet commenced any 'business' as a money lender. It is for the said reason, the plaintiff in his plaint has stated that himself and defendants were known to each other and the first defendant approached him for financial constraints for her family necessities, as such, he lent her a sum of ` 1,50,000/-, otherwise had he really

doing the 'business' in money lending, as on the date of loan transaction that was on 11-02-2004, the plaintiff would have stated that as a money lender, he had lent money to defendant No. 1 at her request. The said statement that the parties knew each other has not been specifically denied. Therefore, it is clear that as on 11-02-2004, the plaintiff was not doing money lending as a 'business', but he had lent the said amount of 1,50,000/to the defendant No.1 since he knew her and also her husband, only to meet the financial necessities of the family of the defendant No.1.

25. Therefore, when the loan transaction dated 11-02-2004 is not proved to be as a part of 'business' in money lending, it cannot be expected that the plaintiff was a money lender under the K.M.L. Act and that he should have necessarily possessed a licence as required under Section 11 of the K.M.L. Act in respect of an occasional stray loan transaction of 11-02-2004.

V. Satyanarayana vs. Sandeep Enterprises: MANU/KA/ 0351/ 2004 - 2004 (4) KCCR 2758 - Even otherwise, if assumed that the cheques were issued by the petitioner/accused in the course of money lending - business, that itself does not attract the provisions contained in Karnataka Money Lenders Act. This is because, under said Act, money lender means "a person, who carried on the business of money lending" and to say that one is a money lender, he or she must

carry on business in money lending in the State and, to record an activity as business, there must be a course of dealings carried with a profit motive. In other words, money lending must be carried on as profession. If the money lending was not with profit motive or, not carried on as a profession, he or she does not become a money lender under the Karnataka Money Lenders Act, as held by this Court in the case of M.N. RADHAMMA v. M.N. VENKATANARAYANAPPA MANU/KA/0148/1979 : ILR 1979 KAR 2138. So, a stray instance of lending money does not show carrying on the business of money lending as profession or with profit motive. In the present case, there is no evidence or material on record to say that the respondent/complainant carried/carry on money lending business and consequently he comes within the meaning of the word "money lender" as defined under the Karnataka Money Lenders Act. So, admission or statement of respondent - PW.1 that he does not possess money lending licence does not come to the aid of the petitioner/accused. firstly, it may be noted that the complaint was not based on the pronote. Secondly, execution of pronote was subsequent to issuing cheques and it was not on the date of cheques. Thirdly, pronote was executed as security in the transaction of loan in which cheques were issued. Lastly, even if assumed that the transaction was with profit motive, it was a stray transaction as not shown that the respondent/complainant was carrying on such transactions as

profession to term him as "money lender" attracting Money Lenders Act. So, said pronote and argument in that regard do not help the accused much to hold the complainant as 'money lender' under Karnataka Money Lenders Act.

Katte Shivappa vs. Kori Eranna: ILR 1986 KAR 180

- **MANU/KA/0231/1985** - Plaintiff's suit for recovery of amounts alleged to have been advanced on 5-7-1979 based on pronotes executed on same day, resisted on the grounds consideration had not passed; plaintiff was a money lender and defendant was a 'debtor'. While the plaintiff stated in examination-in-Chief that he paid the sums on 5-7-1979, in cross-examination he stated that the sums were paid in cash 5 or 6 days before 5-7-1979. The witnesses who had attested the pronotes were not examined and no other evidence was led in to prove passing of consideration. Trial Court having decreed the suit, in Revision its is held that, "Though the plaintiff was entitled to an initial presumption under Section 118(a) of the Negotiable Instruments Act, the course of trial has brought in various factors and circumstances, the cumulative effect of which has been sufficient to destroy the presumption and to place the plaintiff in a position where he cannot succeed only on the basis of presumption and where he is required to establish affirmatively by cogent and positive evidence that the document sued upon was supported by consideration.On facts, held that evidence of payment is not

satisfactorily-established by any satisfactory material on records; the defendant has shown that no consideration passed to him under both the pronotes ; that the suit deserves to be dismissed.In order to make a person money lender within the meaning of the Money Lenders Act, the defendant must show that the plaintiff has been advancing a series of loans in continuity.

Tahira Rehman and Ors. vs. Manipal Sowbhagya Nidhi Ltd. and Ors.: MANU/KA/1850/2017 - 2017

(4) KCCR 3674 - No defence was raised in the written statement as regards the applicability of the Money Lenders Act, 1961. It is imperative that even in the memorandum of appeal, no such ground is raised by the appellants. It is only at the time of arguments, this point was raised. Though this issue is a mixed question of fact and law unless direct evidence is placed on record to establish the same, the same cannot be considered at the appellate stage.

LICENCE CANNOT BE GIVEN WITH RETROSPECTIVE EFFECT

G. Gangappa vs. H.S. Rajanna: ILR 1994 KAR 2036 (DB) MANU/KA/0230/1994 - In the case on hand the loan transaction has taken place on 22-7-1974 and the application for grant of licence is made subsequently thereto. Therefore prayer for the grant of licence made on 11-12-1974 could not have been

granted effective from an earlier date namely 1-1-1974. Since Ex.D.1 dated 11-12-1974 was an application for grant of money lenders licence for the first time there is no question of granting it with effect from 1-1-1974 or renewing the same with effect from 1-1-1974. Application Ex.D.3 dated 11-12-1974 for grant of licence for the year 1975 could not have been made the basis for issuing Ex.P.5 to be valid from 1-1-1974. Therefore the Decision in K.Shivalingaiah v. B.V. Chandrasekhara Gowda ILR 1992 KAR 1996 does not help the appellant as he had not sought renewal of his licence and his application for grant of licence could not have been granted with retrospective effect without the intervention of the Court under Section 11(2) of the Act. Therefore the finding of the lower appellate Court that the appellant was not possessed of valid money lenders licence as on the date of the transaction of money lending on 22-7-1974 needs to be affirmed.

Basappa and Ors. vs. Garemane Kamanna: ILR 1985 KAR 912 MANU/KA/0278/1984 - There is no provision in the Act to grant a retrospective licence. Section 10 of the Act clearly states that the licence shall be valid, from the date on which it is granted upto 31st December following. Therefore any license granted under the Act can only be prospective and will be effective till the end of that year from the date of its issue. As such there is no provision by which a licence could be issued for the part period. Even if such a

licence is issued, as is done in this case, it cannot validate the invalid transaction.Section 5 of the Act creates an absolute bar regarding the carrying on of the money-lender's business without a licence. A detailed examination of the provision of the Act leads to the conclusion that the object of the Act was to serve a public purpose and the mischief it sought to secure was to protect borrowers from unscrupulous and usurious money lenders by prohibiting them from lending monies without obtaining licence, on pain of imprisonment (vide Section 5 and 39) as well as empowering Courts to dismiss such suits.

V.P.R. Finance Corp. vs. R. Lakshminarayana 2002

(3) RCR (Civil) 165: MANU/KA/0984/2000 - Of course, there is a decision in case of Basappa v. Garemane Kamanna reported in ILR 1985(1) Karnataka 912 at p. 914, wherein, it is held that the licence under the Act can be prospective in nature. But in this case, this decision will not come to the rescue for the respondent for the simple reason is that the petitioner had already applied for fresh licence. Of course, the licence was received by him subsequent to the transaction. But the proviso clearly explains that the petitioner was deemed to have a valid licence until orders were received by him on his application for the fresh licence. In the case on hand, a fresh licence was issued which was valid up to 31st December, 1991. This is also marked before the lower Court at Ex. P.10. Once this licence has been issued, it is deemed that

the petitioner had made an application well within time. Even assuming that the application was not made well within time, it is only between the authorities and the licensee. If there was any defective application, the licence could not have been granted. The very fact that the licence has been granted presupposes that the application was received well within the time as contemplated by the law. Hence, in my opinion the proviso of Section 10 makes it clear that till the receipt of the licence, the person who has applied for the licence is deemed to have a valid licence. He cannot take shelter under this proviso only if his licence was not granted subsequent to his application. Hence, the lower Court has erred in coming to the conclusion that there was no valid licence.

EVEN LICENCE LOST - EXTRACT FROM REGISTER IS PROOF FOR HOLDING LICENCE

K. Shivalingaiah vs. B.V. Chandrasekhara Gowda
ILR 1992 KAR 1996: MANU/KA/0379/1992 -

Under the Act it is the Assistant Registrar of Money Lenders who issues the money lenders licence. It is he who has to maintain the Money Lenders Register and it is he who has to take action against the money lenders for any violation of the provisions of the Act and the Rules framed under the Act and the condition of money lenders licence. That being so, the Assistant Registrar of Money Lenders must be held to have been

authorised under the Act to issue a certificate as to whether a particular money lender had the money lending licence for a particular year on the basis of the entries made in the Register of Money Lenders. It may be possible that a licence of a money lender may be lost. The Office of the Assistant Registrar of Money Lenders does not retain the money lenders licence, it only maintains the Register of Money Lenders; in which it enters all the details' of the money lenders licence including the person in whose favour money lenders licence is issued and the period for which the licence is issued. Therefore, in such a situation, the party would be able to secure only the extract of the entries made in the Register of Money Lenders, If it is held that he has no authority to issue a certificate based on the entries made in the Register of Money Lenders it would result in defeating the just cause because the money lenders licence of the party has been lost and he has no other evidence to show that he held money lenders licence at the relevant point of time. As such, in the light of the authority vested in the Assistant Registrar of Money Lenders under the Act, he, in law, is entitled to issue a certificate based on the entries made in the Register of Money Lenders maintained in his office showing that a particular person held money lenders licence for a particular period.

ADVANCING LOAN WITH INTEREST IS BUSINESS

**Keshava Shetty vs. T.C. Sowbhagya and Ors.:
MANU/KA/1326/2017**

12. Section 2 sub-section 2 of the Act defines the "business of money-lending" means the business of advancing loans whether or not in connection with or in addition to any other business. The definition says that advancing loan is a business.

13. Section 2 sub-section 6 of the Act is in respect of "interest" includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise, but does not include any sum lawfully charged by a money-lender for or on account of costs, charges or expenses in accordance with the provisions of this Act, or any other law for the time being in force.

14. Section 2 sub-section 7 of the Act is in respect of "licence" means a licence granted under this Act.

15. Section 2 of sub-section 9 of the Act defines the "loan" means an advance at interest whether of money or in kind, and includes any transaction which the Court finds in substance to amount to such an advance, but does not include- (a) a deposit of money or other property in a Government Post Office Bank or in a Karnataka Government Savings Bank or in any other bank or in a company or with a co-operative society.

16. Section 2 sub-Section 10 of the Act is in respect of "money-lender" which means (i) an

individual; or (ii) an undivided Hindu family; or (iii) a company; or (iv) an unincorporated body of individuals, etc.,

17. Section 2 of sub-section 20 of the Act is in respect of "trader" means a person who in the regular course of business buys and sells goods or other property, whether movable or immovable.

18. Section 11 of the Act is in respect of "Suits by moneylenders not holding licence"

"(1) After the expiry of six months from the date on which this Act comes into force, no Court shall pass a decree in favour of all money-lender in any suit to which this Act applies, filed by a money-lender, unless the Court is satisfied that at the time when the loan or any part thereof to which the suit relates was advances, [and on the date such suit was filed] the money-lender held a valid license.

(2) x x x (3) x x x (4) x x x

(5) Nothing in this section shall affect-

(a) suits in respect of loans advanced by a money-lender before the date on which this Act comes into force;

(b) the powers of an official receiver, an administrator or a Court under the provisions of the Mysore Insolvency Act, 1925, or other corresponding law in force in any area of the State, or of a liquidator under the Companies Act, 1956, to realize the property of a money-lender."

19. From the provisions of this Act, it is clear that the business means advancing the loans with interest and perform as a part of business.....

POWER OF LENDING

K. Subramani Vs. K. Damodara Naidu reported in MANU/SC/1031/2014 : (2015) SCC 99, wherein at para No. 9, it has been held as under: "9. In the present case the complainant and the accused were working as Lecturers in a Government college at the relevant time and the alleged loan of Rs. 14 lakhs is claimed to have been paid by cash and it is disputed. Both of them were governed by the Government Servants' Conduct Rules which prescribes the mode of lending and borrowing. There is nothing on record to show that the prescribed mode was followed. The source claimed by the complainant is savings from his salary and an amount of Rs. 5 lakhs derived by him from sale of site No. 45 belonging to him. Neither in the complaint nor in the chief-examination of the complainant, there is any averment with regard to the sale price of site No. 45. The concerned sale deed was also not produced. Though the complainant was an income-tax assessee he had admitted in his evidence that he had not shown the sale of site No. 45 in his income-tax return. On the contrary the complainant has admitted in his evidence that in the year 1997 he had obtained a loan of Rs. 1,49,205/- from L.I.C. It is pertinent to note that the alleged loan of Rs. 14 lakhs

is claimed to have been disbursed in the year 1997 to the accused. Further the complainant did not produce bank statement to substantiate his claim. The trial court took into account the testimony of the wife of the complainant in another criminal case arising under Section 138 of the N.I. Act in which she has stated that the present appellant/accused had not taken any loan from her husband. On a consideration of entire oral and documentary evidence the trial court came to the conclusion that the complainant had no source of income to lend a sum of Rs. 14 lakhs to the accused and he failed to prove that there is legally recoverable debt payable by the accused to him."

MONEY LENDING RESTRICTIONS BY LAW NOT UNREASONABLE

The State of Karnataka and Ors. vs. The Karnataka Pawn Brokers Assn. and Ors.: MANU/SC/0257 /2018 - AIR 2018 SC 1441 - The profession of money lending, may be a trade, but onerous restrictions may be placed on such trade which is definitely usurious. These onerous restrictions would be reasonable keeping in view the nature of the trade. The Legislature in its wisdom can decide whether it should make it more difficult for people to engage in the business of money lending and pawn broking.
A money lender or a pawn broker applies for licence to do this business knowing fully well that the security that he shall deposit shall not earn any interest. He

with open eyes accepts the condition which is part of the Acts. Nobody forces a person to engage in the trade of money lending or pawn broking. Therefore, the impugned provisions cannot be held to be unreasonable.

LOAN TO A TRADER

Tahira Rehman and Ors. vs. Manipal Sowbhagya Nidhi Ltd. and Ors.: MANU/KA/1850/2017 - 2017 (4) KCCR 3674 - As per Clause (i) of Sub-Section (9) of Section 2, except for the purpose of Section 28, a loan to a trader cannot be construed as a loan for the purpose of the Act. To analyze whether the plaintiff is a trader, it has to be examined with reference to the definition Clause of trader which includes a contractor. The loan was borrowed by defendant No. 1 who was a contractor and defendant No. 2 (both are partners of Regency Builders-defendant No. 7). If the case is analyzed in this angle, certainly the provisions of the Act are not applicable to the facts of the present case. Yet another important aspect which keeps the plaintiff out of the purview of the Act is the notification dated 9th September 1992 issued by the Government of Karnataka under Clause 4(b) of Section 2(10) of the Act. Section 2(10)(4)(b) contemplates, any other financial institutions other than a bank which the State Government may by notification notify, would not come within the realm of the expression 'money lender'. Such notification being issued by the

Government of Karnataka, the provisions of the Act are totally inapplicable to the facts of the case.

U.P. Venkatesh and Ors. vs. The State of Karnataka and Ors. 2001 (2) KCCR 882: MANU/KA

/0857/2000 Before coming into force of the Karnataka Money Lenders' Act, 1961, there were five different enactments in force in different regions of the State relating to Money Lenders and Money Lending. These enactments were not similar in their scope and ambit which necessitated a uniform legislation, on the subject not only to regulate and control, money lending transactions effectively but to protect the innocent debtors. Money Lenders Act, 1961 which replaced the previous enactments now makes comprehensive provisions for issue of licenses to money lenders, conditions of such licenses and forfeiture of security provided by the licensees. It also requires the money lenders to keep accounts and furnish copies. It controls and limits the rate of interest, besides prescribing the procedure to be followed in suits regarding loans advanced by the money lenders. It is not in dispute that the Petitioners advance money on payment of interest to the growers who entrust their produce to them for sale in the APMC yard.The fact that the Petitioners charge interest on the money lent by them is not disputed. In the circumstances unless the loan falls within any one of the exceptions under Clauses (a) to (i) of Section 2(9) of the Act, the same shall be treated

to be a loan for purposes of the Act and the business of lending tantamount to business of "money lending". The expression "Trader" has been defined in Section 2(20) of the Act to mean a person who in the regular course of business buys and sells goods or other property, whether moveable or immovable and includes wholesale or retail merchants, Commission Agents, brokers, manufacturers, contractors, and factory owners but does not include artisans or persons who sell their agricultural produce or cattle or buy agricultural produce or cattle for their use.The growers of arecanut do not obviously qualify as traders so as to exempt loans advanced to them from the purview of the Act. In the circumstances therefore, the Licensing Authority was perfectly justified in holding that the business carried on by the Petitioners was money lending business which required them to obtain licenses under the Act, and also to pay the security deposit demanded.

Gujjala Hanumanthappa and Ors. vs. S. Bala Rangaiah: MANU/KA/0068/1987 - ILR 1987 KAR 1201.

The evidence on record shows that the plaintiff is also a flower vendor and the defendants are persons growing flowers and selling them to the flower vendors. Thus, it cannot be considered to be a loan within the meaning of Money Lenders Act. It would amount to lending between two traders. The amount is advanced for the supply of flowers. It would amount

to an advancement of money for supply of the articles to a regular trader. Therefore, it would be transaction between two traders themselves. Therefore, it does not come within the meaning of a loan under the Money Lenders Act.

M/s. Fatehchand Himmatlal and Ors. v. State of Maharashtra MANU/SC/0041/1977 : (1977) 2 SCC 670 Money-lending, banking, insurance and other financial transactions, commercial credit and mercantile advances may, conceptually, be characterised as 'business'. Mercantile credit, money-lending, pawn-broking and advances on pledges are business. Otherwise, the commerce of our country will grind to a halt. Can we conceive of trade without credit, or commerce without mercantile documents, discounting, lending and negotiable paper? To deny to monetary dealings the status of trade is to push India into the medieval age. Broadly viewed, money-lending amongst the commercial community is integral to trade and is trade.

Bawa Enterprises and Ors. vs. G.R. Shet and Ors.: 2016 (3) KCCR 1956 - MANU/KA/4761/2015 - When a money lender advanced loan to a trader, the object of advancing loan was not to earn interest thereon. Therefore, it was said, person lending money cannot be considered as 'money lender' and he need not possess a valid money lending licence for advancing the loan. The object is to ensure money

advanced to the businessman is invested in the business and the person who lends money gets promptly his share of profit by way of interest. If that is the object of keeping the loan transaction to a trader outside the purview of Money Lenders Act, it is unthinkable that when he commits default, the interest payable could be more than the principal amount. Precisely, that is why the Legislature has introduced Sections 26 and 28 of the Money Lenders Act which is made applicable to money transactions that fall within the definition of "loan" under the Act and also the loan which is outside the scope of loan by a money lender.

Apex Court in the case of **M/s. P. Vaikunta Shenoy and Co., v. P. Hari Sharma reported in (MANU/SC/8080/2007 : 2007 AIR SCW 7167)**, where the Supreme Court dealing with the case of person advancing money to supplier or goods to ensure regular supply, not a money lender, as defined under Section 2(10) of the Act has held as under:--

"7. It may be mentioned that the purpose of the Act was to prevent the malpractice of oppression by money-lenders to take advantage of people's poverty.

8. In the money lending business the object of the money-lender is to earn interest on the loan he has advanced. In the present case the object of advancing the loan by the appellant was not to earn interest thereon but to ensure the regular supply of areca nuts. Though, no doubt, interest at the rate of 18 per

cent per annum was charged on these loans yet that was not the principal object of advancing the loan.

9. In business various methods are adopted by a businessman for ensuring the smooth running of his business. Very often, one of the methods is that the businessman advances money to his supplier of goods to ensure that the supplies are regular and are made to him rather than being diverted to other parties. There is nothing illegal in this practice and it is widespread.

10. When we construe the provisions of the Karnataka Money Lenders Act we must see the object for which it was made and we have to adopt the purposive construction.

13. In view of the above discussion we are of the opinion that a purposive interpretation has to be given to the definition of money-lenders. From this angle the appellant could not be said to be a money-lender as he was not really doing the business of money lending in the strict sense but was only advancing loans to secure the regular supply of areca nuts."

CHIT BUSINESS IS NOT LENDING BUSINESS

Shriram Chits and Investment (P) Ltd. v. Union of India and Ors. MANU/SC/0317/1993 : 1993 Supp. (4) SCC 226

Court declared the following propositions pertaining to the business of chit funds:

- (a) The Act, in pith and substance, deals with special contract and consequently falls within entry 7 of list III of the 7th Schedule to the Constitution of India;
- (b) A chit fund transaction is not a case of borrowing, nor is it a loan transaction. If a subscriber advances any amount, he does so only to one of the members;
- (c) The funds of the chit fund belong to the entire lot of subscribers;
- (d) The amounts are in deposit which the stake holder only holds a trust for the benefit of the members of the fund;
- (e) The foreman acts only as a person to bring together the subscribers and he is subject to certain obligations with a view to protecting the subscribers from any mischief or fraud committed by him by using the position;
- (f) Commission is payable to the foreman for the service rendered by him as he does not lend money belonging to him.

MONEY LENDER - MONEY LENDING - LOAN

Section 2. of the Karnataka Money-lenders' Act, 1961. -In this Act, unless the context otherwise requires,--(2) '**business of money-lending**' means the business of advancing loans whether or not in connection with or in addition to any other business".

Section 2(9) defines **what is meant by loan**. Section 2(9) reads as under.- "(9) 'Loan' means an advance at

interest whether of money or in kind, and includes any transaction which the Court finds in substance to amount to such an advance, but does not include-

(a) a deposit of money or other property in a Government Post Office, Bank or in a Karnataka Government Savings Bank or in any other Bank or in a company or with a co-operative society;

(b) a loan to, or by, or a deposit with, any society or association registered under the Karnataka Societies Registration Act, 1960 (Karnataka Act 17 of 1960);

(c) a loan advanced by Government or by any local authority authorised by Government;

(d) a loan advanced by a co-operative society;

(e) an advance made to a subscriber to, or a depositor in, a provident fund from the amount standing to his credit in accordance with the rules of the fund;

(f) a loan to or by an insurance company as defined in the Insurance Act, 1948 (Central Act IV of 1938);

(g) a loan to or by a bank;

(h) an advance of not less than three thousand rupees made on the basis of the negotiable instrument as defined in the Negotiable Instruments Act, 1881 (Central Act XXVI of 1881) other than on the basis of a promissory note;

(i) except for the purposes of Sections 26 and 28,--

i) a loan to a trader;

(ii) a loan to a money-lender who holds a valid licence;

(iii) a loan by a landlord to his tenant financing of crops or seasonal finance of not more than fifty rupees per acre of land held by the tenant".

Sub-section (10) defines "money-lender" as under.-

"(10) '**Money-lender**' means-

- (i) an individual; or
- (ii) an undivided Hindu family; or
- (iii) a company; or
- (iv) an unincorporated body of individuals; who or which-
 - (a) carries on the business of money-lending in the State; or
 - (b) has his or its principal place of such business in the State, but shall not include a bank; (or any other financial institution which the State Government may, by notification specify in this behalf)".

P. Hari Sharma vs. P. Vaikunta Shenoy and Company, Bunder, Mangalore 2001 (3) Kar LJ 357

: MANU/KA/0183/2001 - Money-lender is one, he may be an individual or an undivided Hindu family or it may be a company or an unincorporated body of individuals if it carries business of money-lending in the State of Karnataka or has his or its principal place of business in the State. But, according to the definition, Bank is not included nor any financial institution will be included within this expression which the State Government may specify in that manner. Money-lending business, as the definition clause indicates, means business of advancing loans, whether loan is advanced in connection with any other business of money-lender or advance of loan business is done in addition to

other business or even it may not be in connection with other business. Business of money-lending means business of advancing loan. An isolated transaction of advancing loan may not come within the framework of expression "business". It indicates that the expression business carries with itself i.e., advancing of loan must consist of series of transaction either with individuals or with different persons. The expression "loan" has been defined to mean giving of advance at interest, whether giving of advance is in the form of money or in kind and includes any transaction which in substance amounts to such advance. No doubt clauses (a) to (i) of sub-section (9) of Section 2 provides exceptions where advances may not amount to a loan. If a case comes within the framework of either of clauses (a) to (i), then it may not amount to a loan. Otherwise advance on being made at interest, whether it is in the form of cash or in kind, that will amount to a loan. If a person is found to be carrying on business of money-lending, then under Section 5 he has to obtain a licence and no person is entitled to carry on business of money-lending in the State of Karnataka except after obtaining the licence and under and in accordance with the terms and conditions of the licence granted under Sections 7 and 7A of the Act. - **This case went to Supreme Court and appeal allowed, setting aside above order.**

P. Vaikunta Shenoy and Co. vs. P. Hari Sharma :
MANU/SC/8080/2007 - AIR 2008 SC 416 - 8. In the

money lending business the object of the money-lender is to earn interest on the loan he has advanced.

In the present case the object of advancing the loan by the appellant was not to earn interest thereon but to ensure the regular supply of areca nuts. Though, no doubt, interest at the rate of 18 per cent per annum was charged on these loans yet that was not the principal object of advancing the loan.

9. In business various methods are adopted by a businessman for ensuring the smooth running of his business. Very often, one of the methods is that the businessman advances money to his supplier of goods to ensure that the supplies are regular and are made to him rather than being diverted to other parties. There is nothing illegal in this practice and it is widespread.

10. When we construe the provisions of the Karnataka Money Lenders Act we must see the object for which it was made and we have to adopt the purposive construction.

13. In view of the above discussion we are of the opinion that a purposive interpretation has to be given to the definition of money-lenders. From this angle the appellant could not be said to be a money-lender as he was not really doing the business of money lending in the strict sense but was only advancing loans to secure the regular supply of areca nuts.

INTEREST IN MONEY LENDING AND RULE OF DAMDUPAT

**Bawa Enterprises and Ors. vs. G.R. Shet and Ors.:
2016 (3) KCCR 1956 - MANU/KA/4761/2015**

Under the provisions of the Act, the rate of interest recoverable by a money lender is prescribed. The money lender is under obligation to recover only that interest prescribed by the Government. Any recovery in excess of the said amount is contrary to Section 28 Karnataka Money-lenders' Act, 1961, and becomes an offence under Section 39 and punishable. Section 26 prescribes an outer limit for maximum interest that a money lender can recover from a person to whom he has advanced loan. In other words, a money lender should never expect more than the principal amount advanced, even if a claim is put forth under an agreement, or under any law. The non-obstante clause found in Section 26, makes it clear that notwithstanding anything contained in any agreement or any law for the time being in force, the Court is precluded from passing a decree insofar as interest is concerned in excess of the principal amount. Therefore, though the loan to a trader does not fall within the definition of the "loan" as found in Section 2(9) of the Act and that provision of the Act is not applicable, expressly Sections 26 and 28 of the Act has been made applicable to such loans. Section 28 of the Act confers power on the State Government to fix the maximum rate of interest for any local area or class of business of money-lending in respect of secured and unsecured loans. Sub-Section (2) of

Section 28 starts with a non-obstante clause. Whatever may be the agreement between the parties for payment of interest, the interest payable is, what is fixed by the Government by way of a Notification and no Court shall, in any suit to which the Act applies, award interest exceeding the said rate. If a money lender receives interest in excess of maximum rate fixed by the Government, sub-Section (3) of Section 28 gets attracted. Then it would amount to an offence under Section 39 of the Act. The rule of damdupat does not apply to interest recoverable in execution of a decree. The reason is that the rule ceases to operate after the suit. The principle of the Section applies not only to a suit brought by a creditor, but also to a suit for redemption brought by a mortgager. The rule of damdupat is a branch of Hindu Law of debts. According to this rule, the amount of interest recoverable, at any one time cannot exceed the principal. Where a suit has been instituted to recover a loan, the rule of damdupat ceases to operate. The result is that though the Court is bound to apply the rule of damdupat up to the date of the suit, it is free to award interest to the creditor at such rate, as it thinks proper from the date of the suit, up to the date of decree or payment upon the total amount that may be found due to the plaintiff after applying that rule. The rule of damdupat finds a statutory recognition in the Karnataka Money Lenders Act, 1961. Section 26 of the Act provides that notwithstanding anything contained in any agreement

or any law for the time being in force, no Court shall in respect of any loan whether advanced before or after the date on which the Act comes into force, decree, on account of interest, a sum greater than the principal of the loan due on the date of the decree. Thus, the rule of Hindu Law has been incorporated in the Act in respect of the loans advanced by money-lenders.The Court is under an obligation to find out under Section 26 of the Act, what is the total amount of interest it is awarding on the principal amount and ensure that the interest so awarded is not in excess of the principal amount due on the date of the decree. However, the interest to be so calculated is from the date of borrowing up to the date of decree. The Court should not take into consideration the future interest from the date of the decree. If the suit is decreed for the principal amount and equal amount of interest on the principal amount and still the defendant fails to comply with the decree, he would be liable to pay interest for the period subsequent to the date of decree.Admittedly, the total interest payable in terms of the decree is in excess of the principal amount due. To that extent, the decree is liable to be set-aside.-The defendants have already paid the principal amount plus equal amount of interest, the question of enforcing the decree would not arise. However, if the said amount is not paid immediately on passing of the decree, there is delay and the defendants are liable to pay interest at 18% from the date of decree till the date of such payment

i.e., interest at 18% on the principal amount plus equal amount of interest from the date of the decree i.e., 26.11.2011 till the date of payment i.e., 08.05.2015.

Lakshminarasamma and Ors. vs. C.V. Raghavachar and Ors. AIR 1976 Kant 209 : MANU/KA/0068/1976 - The rule of Damdupat applies. Moreover, under Section 26 of the Karnataka Money Lenders Act the maximum interest payable would be equal to the principal. Since appellants are willing to pay the above said maximum amount of interest viz., Rupees 2,750/- there is no necessity to direct further inquiry as to the amount of mortgage money which has to be paid by the appellants before they can seek redemption.

Supreme Court in the case of **K. Manick Chand & others v. Elias Saleh Mohammed Sait & others reported in [MANU/SC/0310/1968 : 1969(1) SCC 52]**, while dealing with Mysore Money Lenders Act, 1939 and the scope of Section 17 calculation of interest, the Apex Court has held as under:-- "So far as the first point raised by learned counsel is concerned, it appears to us that it is totally misconceived, because the language of Section 17 of the Act plainly justifies the view taken by the High Court. Section 17, in prescribing the maximum amount of arrears of interest to be allowed, refers to "the principal of the original loan" and not "the

principal of the loan". If the latter expression had been used, it could have been argued in the present case that the sums of Rs. 20,000/- and Rs. 24,000/- which purported to be the principal amounts of the two loans evidenced by the two mortgage-deeds in suit, were the principal amounts of the loans to be taken into account in working out the maximum amount of interest permissible under Section 17 of the act, The expression "the principal of the original loan" makes it clear that, in determining the maximum amount of arrears of interest allowable, the Court must get behind the transaction of the loan and find out what was the actual cash originally advanced as principal and ignore all interest that may have been added subsequently to that original advance in order to make up the consideration for the loans in suit. In the present case, therefore, the High Court was justified in looking at the transactions prior to the two mortgage-deeds to find out what were the actual cash amounts originally advanced which together with interest and after adjustment of accounts, formed the principal amounts for the two mortgage-deeds. It was admitted by counsel for both parties before us that the figures accepted by the High Court as the principal amounts of the two loans are correct, if the original cash advances are treated as the principal amounts of the original loans. It is, therefore, clear that, on the plain language of Section 17 of the Act, the High Court was right in holding that the aggregate of the principal amount of the original loans was only Rs. 37,971.50 P

and not Rs. 44,000/- and, consequently in awarding arrears of interest only to the extent of the same amount and not a larger amount.On the second question, we are unable to agree with the view of the High Court that the arrears of interest mentioned in Section 17 of the Act mean interest calculated up to the date fixed for redemption. At the same time we are also unable to accept the submission made on behalf of the appellants that the arrears of interest in this section mean arrears of interest up to the date of the suit. It is to be noticed that the section is in the form of a directive to a Court not to pass a decree on account of arrears of interest for a sum greater than the principal of the original loan. This language clearly gives an indication of the intention of the Legislature. Obviously, the directive is to be carried out by the court at the time of passing the decree and, consequently, it would at that time that the court will see how much it is awarding for arrears of interest. The maximum prescribed for the arrears of interest must, therefore, be held to be the maximum amount in respect of interest payable up to the date of the decree when the court carries out the directive laid down in this section. In the present case, the trial court passed the decree on the 27th March, 1952, and, consequently, the amount of Rs. 37,971.50 awarded as arrears of interest must be the arrears of interest due up to that date. The High Court, in our opinion, was not correct in holding that

these arrears of interest will cover interest due up to the date fixed for redemption by the High Court".

EVEN LOAN TO A TRADER IS BOUND BY ALLOWED INTEREST UNDER THE ACT

Bawa Enterprises and Ors. vs. G.R. Shet and Ors.:

2016 (3) KCCR 1956 - MANU/KA/4761/2015 - The

Karnataka Legislature, in order to make better provision in the matter of regulation and control of transactions of money lending, has enacted the Karnataka Money Lenders Act, 1961, Karnataka Act No. 12 of 1962, which came into force from 01.04.1965. By subsequent amendment to the Act, in particular, Section 11 of the Act, an embargo is cast on the power of the Court to pass a decree in favour of a money lender, unless such money lender possesses a money lender's licence either at the time when the loan was granted or any part thereof, to which the suit relates was advanced. Therefore, as the law stands today, the money lender cannot maintain a suit for recovery of the loan advanced, unless he possesses a valid money lending licence. The Act has carved out certain exceptions. From the provisions of the Section 2(9), it is clear that if a money lender advanced loan to a trader or to a money lender, who holds a valid licence, or to a tenant for financing of crops of not more than fifty rupees per acre of land held by the tenant, the Act is not applicable; the money lender need not possess valid licence for

recovery of the said amount on the date of filing of the suit or on the date the loan was advanced. -But on a closer scrutiny of Clause (i) expressly states "except for the purposes of Sections 26 and 28". If this expression was not there, then the Act would have no application when a loan is advanced to a trader. But, what the provision provides is that, notwithstanding the fact that a loan to a trader would not fall within the definition of "loan" under the Act, the provisions contained in Sections 26 and 28 are attracted to such loans to a trader by a money lender who possess valid money lending licence. The plaintiff is money lender. Whether he lends money to a trader or to any other person, he is not entitled to interest more than what is contemplated under Section 26 of the Act and no Court shall pass a decree in contravention of Section 26, where it is expressly stated that the interest payable should not exceed more than the principal amount.

RESTRICTION ON MONEY LENDING BUSINESS

Court in M/s. Fatehchand Himmatlal and Ors. v. State of Maharashtra MANU/SC/0041/1977 : (1977) 2 SCC 670 held that even if it be accepted that money lending is a trade then also restrictions can be placed upon it. The following observations are relevant: Money-lending and trade financing are indubitably "trade" in the broad rubric, but our

concern here is blinkered by a specific pattern of tragic operations with no heroes but only anti-heroes and victims.These are weaker Sections for whom constitutional concern is shown because institutional credit instrumentalities have ignored them. Money lending may be ancillary to commercial activity and benignant in its effects, but money-lending may also be ghastly when it facilitates no flow of trade, no movement of commerce, no promotion of intercourse, no servicing of business, but merely stagnates rural economy, strangulates the borrowing community and turns malignant in its repercussions. The former may surely be trade, but the latter -- the law may well say -- is not trade. In this view, we are more inclined to the view that this narrow, deleterious pattern of money-lending cannot be classed as "trade".... Maybe, some stray money-lenders may be good souls and to stigmatise the lovely and unlovely is simplistic betise. But the legislature cannot easily make meticulous exceptions and has to proceed on broad categorisations, not singular individualisations. So viewed, pragmatics overrule punctilious and unconscionable money-lenders fall into a defined group..... Every cause claims its martyr and if the law, necessitated by practical considerations, makes generalisations which hurt a few, it cannot be helped by the Court.....

The State of Karnataka and Ors. vs. The Karnataka Pawn Brokers Assn. and Ors. AIR 2018 SC 1441 :

MANU/SC/0257/2018 - We must also remember that the businesses of money lending and pawn broking are usurious businesses and the Government may rightly impose onerous conditions to restrict or even discourage people from entering into such businesses. We are not comparing these businesses with the liquor business but the observations of the Kerala High Court in *Monarch Investments St. Thomas Road, Trichur and Ors. v. State of Kerala and Ors.* MANU/KE/0039/1989 : AIR (1989) KER. 177 are relevant It is thus apparent that the courts have frowned upon the "trade" of money lending. The profession of money lending, may be a trade, but onerous restrictions may be placed on such trade which is definitely usurious. These onerous restrictions would be reasonable keeping in view the nature of the trade. The Legislature in its wisdom can decide whether it should make it more difficult for people to engage in the business of money lending and pawn broking.A money lender or a pawn broker applies for licence to do this business knowing fully well that the security that he shall deposit shall not earn any interest. He with open eyes accepts the condition which is part of the Acts. Nobody forces a person to engage in the trade of money lending or pawn broking. Therefore, the impugned provisions cannot be held to be unreasonable.Lastly, we have to consider the submission as to whether a provision providing that no interest is payable on the

security deposit is so arbitrary, as to make it unconstitutional.

Kerala High Court in Monarch Investments St. Thomas Road, Trichur and Ors. v. State of Kerala and Ors. MANU/KE/0039/1989 : AIR (1989) KER.

177 are relevant:Broadly stated, money lending is business. But it has to be remembered that money lenders usually charged heavy interest, impose very onerous conditions for the grant of loans, and the poor debtor may, in almost all cases be compelled to sell his produce or part with his land. Money lending as a business thus forms part of a pernicious trade requiring greater monetary Regulation and control than those imposed on the normal trade or business..... Money-lenders whether described as belonging to a "narrow noxious category" or "as oppressive and back breaking", whether there are honest money lenders or unscrupulous money-lenders form a special class whose business require greater statutory control and supervision and whose "freedom to fleece" has to be restrained in public interest.....

The State of Karnataka and Ors. vs. The Karnataka Pawn Brokers Assn. and Ors. AIR 2018 SC 1441 : MANU/SC/0257/2018

40. It is thus apparent that the courts have frowned upon the "trade" of money lending. The profession of money lending, may be a trade, but onerous

restrictions may be placed on such trade which is definitely usurious. These onerous restrictions would be reasonable keeping in view the nature of the trade. The Legislature in its wisdom can decide whether it should make it more difficult for people to engage in the business of money lending and pawn broking.

41. A money lender or a pawn broker applies for licence to do this business knowing fully well that the security that he shall deposit shall not earn any interest. He with open eyes accepts the condition which is part of the Acts. Nobody forces a person to engage in the trade of money lending or pawn broking. Therefore, the impugned provisions cannot be held to be unreasonable.

43. In *Independent Thought v. Union of India and Anr.* MANU/SC/1298/2017 : (2017) 10 SCC 800 this Court held that arbitrariness must be writ large to make it un-constitutional. Whether the interest should be paid or not is a matter which parties decide amongst themselves. Supposing, there is a contract providing that no interest will be paid on the amount advanced; can it be said that such a Clause in the contract is so arbitrary that the contract becomes void or becomes inoperative. We do not think so. If we make reference to every day transactions, banks do not pay interest on current account. Supposing, a person's money lies in the current account for 3-4 years he cannot claim interest only on the ground that the bank would have utilized this money for commercial purposes. There are various instances

where schools, other educational institutions, clubs, societies ask for refundable deposits on which no interest is payable. These are accepted to be normal routine practices because these bodies are not engaged in commercial activities. Even a pawn broker pays no interest on the value of the security pledged with him.

Union of India (UOI) vs. Annam Ramalingam and Ors. : MANU/SC/0051/1985 - AIR 1985 SC 1013

It does not impose any blanket or absolute prohibition upon a dealer from carrying on money-lending, banking or any other business in the same premises in which he carries on business as a dealer but he is prevented only from carrying on business as money-lender or banker on the security of any article, ornament or both unless authorized by the Administrator. Even the restriction in the case of a third person in carrying on business as a money-lender, banker or any other business in the same premises is not absolute inasmuch as the Administrator can authorize the third person to carry on the business in the licensed premises of the dealer and while implementing such limited restrictions or granting relief against the same he will be guided by the policy and purposes of the Act and by the prime consideration that circumvention of the other provisions of the Act shall not be permitted.

IF ILLEGALITY COMMITTED - MONEY LENDING LICENSE CANNOT BE RENEWED

Hutchaiiah vs. State of Karnataka: ILR 1985 KAR 1048 MANU/KA/0288/1984 - An application filed under Sub-section (4) of Section 6 of the Act, even though it is beyond the time, if it is accompanied by a licence fee at double the rate as specified, is an application for the purpose of Section 7 of the Act, and it has to be enquired into and disposed of in accordance with the provisions contained in Section 7 of the Act. It is necessary that an enquiry has to be held under Section 7 of the Act, and if that enquiry reveals such acts of commission and omission which go to show that it is not at all just and proper, or it is not permissible having regard to the scheme and object of the Act, and the provisions contained therein, to renew the licence the authority can refuse to renew the licence. Therefore, the rejection of the application without holding an enquiry as per Section 7 of the Act, read with Rule 8 of the Rules, cannot be sustained.

ASSIGNMENT OF DEBT BY MONEY LENDER - NECESSITY OF NOTICE

KARNATAKA MONEY-LENDERS ACT, 1961
Section 31 - Application of Act as respects assignees

(1) Save as hereinafter provided, where any debt due to a money-lender in respect of money lent by him

whether before or after the date on which this Act comes into force, or of interest on money so lent or of the benefit of any agreement made or security taken in respect of any such debt or interest, has been assigned, the assignee shall be deemed to be the money-lender and all the provisions of this Act shall apply to such assignee as if he were the money-lender,

(2) Notwithstanding anything contained in this Act or in any other law for the time being in force, where for any reason any such assignment is invalid and the debtor has made any payment of money or transfer of property on account of any loan which has been so assigned, the assignee shall in respect of such payment or transfer be deemed to be the agent of the money-lender for all the purposes of this Act.

KARNATAKA MONEY-LENDERS ACT, 1961

Section 30 - Notice and information to be given on assignment of loan

(1) Where a loan advanced, whether before or after the date on which this Act comes into force, or any interest on such loan or the benefit of any agreement made or security taken in respect of such loan or interest, is assigned to any assignee, the assignor (whether he is the money-lender by whom the money was lent or any person to whom the debt has been previously assigned) shall, before the assignment is made,--

(a) give the assignee notice in writing that the loan, interest, agreement or security is affected by the operation of this Act;

(b) supply to the assignee all information necessary to enable him to comply with the provisions of this Act; and

(c) give the debtor notice in writing of the assignment supplying the name and address of the assignee.

(2) Any person acting in contravention of the provisions of sub-section (1) shall be liable to indemnify any other person who is prejudiced by the contravention.

**K. Shivalingaiah vs. B.V. Chandrasekhara Gowda
ILR 1992 KAR 1996: MANU/KA/0379/1992** - It is

contended by him that as the claim in the suit is based on the assignment of the pronote debt by defendant No. 3 to the plaintiff, Section 30 of the Act is attracted and as such the third defendant before assigning the pronote Ex.P.3 ought to have issued notice as required by Clause (c) of Sub-section (1) of Section 30 of the Act. We may only point out that whether there was a notice issued under Section 30(1)(c) of the Act or not is not a pure question of law. It is a question of fact. The contention was not raised in the written statement nor was it urged before the trial Court and no issue was raised. We do not get any indication either in the pleadings or the evidence adduced by the parties. It is highly hazardous to allow such a point to be raised at the stage of appeal that too only during

the course of hearing without any application seeking appropriate amendment to the written statement. Failure to issue a notice before assignment of the pronote has serious consequences as provided under Section 30 of the Act. A person who contravenes the provisions contained in Sub-section (1) of Section 30 of the Act is liable to indemnify any other person who is prejudiced by such contravention. In addition to that, the contravention of Section 30 of the Act also leads to penal consequences as provided by Section 39 of the Act. Therefore, we are of the view that if we allow this contention to be raised at the appellate stage during the course of hearing, it would cause great injustice and prejudice to the third defendant. Therefore, we are of the view that the contention should not be allowed to be raised at the appellate stage.

FILLING WRONG SUMS AFTER EXECUTION OF DOCUMENT IS AN OFFENCE

KARNATAKA MONEY-LENDERS ACT, 1961

Section 37 - Entry of wrong sum in bond, etc., to be an offence

(1) No money-lender shall take any promissory note, acknowledgment, bond or other writing which does not state the actual amount of the loan, or which states such amount wrongly or execute any instrument in which blanks are left to be filled after execution.

(2) Whoever contravenes the provisions of sub-section (1) shall, on conviction, be punished with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

HARASSING DEBTOR IS AN OFFENCE

KARNATAKA MONEY-LENDERS ACT, 1961

Section 38 - Penalty for molestation - Whoever molests, or abets the molestation of, a debtor for the recovery of a debt due by him to a creditor shall, on conviction, be punished with imprisonment which may extend to six months or with fine which may extend to 1[five thousand] rupees or with both.

Explanation.--For the purposes of this section, a person who, with intent to cause another person to abstain from doing any act which he has a right to do or to do any act which he has a right to abstain from doing,--

- (a) obstructs or uses violence to or intimidates such other person, or
- (b) persistently follows such other person from place to place or interferes with any property owned or used by him or deprives him of, or hinders him in, the use of any such property, or
- (c) loiters at or near a house or other place where such other person resides or works, or carries on business, or happens to be, or

(d) does any act calculated to annoy or intimidate such other person or the members of his family, or

(e) moves or acts in a manner which causes or is calculated to cause alarm or danger to the person or property of such other person, -shall be deemed to molest such other person:

Provided that a person who goes to the house or place referred to in clause (c) in order merely to obtain or communicate information shall not be deemed to molest.

Chigateri Banneppa Chandramma and Ors. vs. State of Karnataka: MANU/KA/2281/2017

Brief facts of the prosecution case that respondent Police registered the complaint against the petitioner in Crime No. 36/2015 on the basis of the complaint lodged by Sri Nekar Madaihalli Kotresha for the offences punishable under Section 38 and 39 of Karnataka Money Lenders Act, 1961, Sections 3 and 4 of Karnataka Prohibition of Charging Exorbitant Interest Act, 2004 and Section 420 of IPC and took up the investigation. Being aggrieved by the same, the petitioners herein moved an application under Section 239 of Cr.P.C. before the JMFC Court seeking discharge from the proceedings, it was opposed by the prosecution; after hearing the said application and considering the merits of the case, ultimately it is held by the JMFC Court that there is a prima-facie material and it is not a case for discharge of the accused person. Accordingly, the application came to be

rejected. Being aggrieved by the same, the petitioners/accused are before this Court in this petition challenging the legality and correctness of the order of the trial Court High court in the above case, perused the order dated 22.06.2017 passed by the Court in CrI.P. 101569/2016 along with connected batch of petitions, wherein similar questions of law and facts were involved and the Court referring to the relevant provisions, allowed the said petitions and quashed the proceedings.

11. Therefore, it is only the Registrar and the Assistant Registrar or any other person, who is authorised by the State Government in that behalf only are the persons authorised to enter into the premises of the money lenders to inspect and seize the documents and also to verify whether the business of money lending is carried on in accordance with the provisions of money lending or not.

But, admittedly, in the cases on hand, the persons entered into the premises of the alleged money lenders i.e., the petitioners/accused in the above petitions, are neither the Registrars nor the Assistant Registrars nor any person authorised by the State Government in that behalf. There is no material produced to show that the said Police Officer was authorised by the State Government to enter into the premises in case of the alleged offence under the provisions of Karnataka Money Lenders Act. Therefore, the alleged entry into the premises of the petitioners herein is also not in accordance with the

mandatory provisions of Karnataka Money Lenders Act.

12. Looking to the materials placed on record and as per the case of the prosecution when the information is said to have been received that some of the persons are charging exorbitant interest to the poor borrowers and they are collecting excess amount from them violating the provisions of Karnataka Money Lenders Act, the Police along with the staff and the panch witness proceeded to the spot, made an entry into the premises of the respective petitioners and they have seized the documents and they came to know that the petitioners are charging exorbitant interest to the loan advanced by them, the documents were seized under the seizure mahazar in the presence of panch witnesses, then arrested the petitioners, came back to the Police Station, then the complaint was lodged and FIR was registered, so this procedure adopted by the complainant/Police shows that by the time the complaint was lodged and FIR was registered, more than half of the investigation was completed in these matters. Therefore, this clearly shows that even as per the Police, a cognizable offence was committed, and without registering the FIR immediately, the further investigation of the case has been proceeded with, which is against the mandatory requirements of the provisions of Criminal Procedure Code.

13. Apart from that so far as the allegations that the witnesses, whose statements said to have been recorded that they are the borrowers of the loan

from the above mentioned respective petitioners and stating further that the petitioners used to charge exorbitant interest (meter interest) and thereby they were molesting the poor borrowers is concerned, there is a remedy provided to the borrowers that they can follow the procedure as contemplated under Section 5 of Karnataka Prohibition of Charging Exorbitant Interest Act, which reads as under: 5. Deposit of money and presentation of petition to court and the procedure thereof.-(1) A debtor may deposit the money due in respect of a loan received by him from any person together with interest at the rate fixed by the State Government under section 28 of the Karnataka Money Lenders Act, 1961 into the Court having jurisdiction, along with a petition to record that the amount deposited is in full or part, satisfaction of the loan including the interest therefor, as the case may be. (2) The Court shall, on receipt of a petition under sub-section (1), refer a copy of the petition to the person mentioned in the petition, directing him to give his replies within a period of fifteen days as may be granted by the Court. The Court may, after due inquiry and after considering the versions of both the parties, pass orders recording the satisfaction of the loan and interest therefor in full or in part, as the case may be.

14. When such procedure is contemplated, without following the said procedure, the borrowers said to have given the statement before the Investigating Officer is also cannot be considered to be

proper and the procedure followed by the borrowers, in view of the above discussion and in view of the above mentioned legal infirmities in the cases, I am of the opinion that the petitioners have made out the case to allow the petitions. Accordingly, all the above petitions are allowed. The FIRs challenged by the petitioners herein in the respective petitions and the criminal proceedings initiated in criminal cases are hereby quashed."

In view of these materials placed on record by the petitioners herein, I am of the opinion that petitioners have made out a case for allowing their application seeking discharge from the proceedings. Therefore the order passed by the learned JMFC Court rejecting the application filed by the petitioners is illegal and it is not sustainable in law. Hence, the petition is allowed and the impugned order dated is set-aside and the petitioners/accused Nos. 1 and 2 are discharged from the proceedings.

EFFORT MADE BY TRANSPORT COMMISSIONER TO CHECK MONEY LENDERS - STRUCK DOWN ON TECHNICALITY

Karnataka Hire Purchase Association vs. Commissioner for Transports in Karnataka and Ors.: MANU/KA/0759/2011 - 2011 (2) KCCR 1652

In the circular it is noted that as per Section 51 of the Motor Vehicles Act, 1988, entries have been made in

the RC Books in the usual course with regard to the vehicle owners who have purchased the vehicles on obtaining loan/financial assistance from nationalised banks and other financial institutions. However, it is also expressed that some transport financiers and also private financiers are extracting more interest and thus deceiving the vehicle owners. Referring to the provisions of the Karnataka Money Lenders Act, 1961 and the Karnataka Money Lenders Rules, 1965 therein and also based on the letter of the Government dated 14-6-2010, the Commissioner for transport has issued the circular to various Regional Transport Officers directing the registering authorities to cross-check private financiers whether they are registered under the Karnataka Money Lenders Act and also whether they are charging interest in excess of the limit prescribed under the Exorbitant Interest Act on the money lent for the purchase of the vehicle and, only after securing the necessary documents in this regard, to make entry of the name of the financier in the RC Book, meticulously.

Section 51 of the Motor Vehicles Act, 1988 provides for making an entry in the RC Book. Section 51 mandates, when an application for registration of motor vehicle is made under hire purchase/lease/hypothecation agreement, the Registering Authority shall make an entry in the Certificate of Registration regarding existence of the said agreement. The Section also provides for the

procedure on such termination of the agreement and transfer, etc.

However, under the Karnataka Money Lenders Act if the licence is made compulsory for money lending, for violation of the same, penal consequences could be invoked under the Act on coming to know of the illegal money lending and, it is open to the concerned Department under the Act to have recourse to law. Since already this Court has held that such imposing of conditions by way of a circular, is extraneous to the Motor Vehicles Act, 1988 thereby violating the provisions provided under Section 51 of the Motor Vehicles Act. The very idea behind the circular though would be noble, it cannot be held as a regulatory measure by the RTO authorities. In the circumstances, the circular and its implications would be implemented as per the provisions of the Karnataka Money Lenders Act and not under the Motor Vehicles Act, 1988 or by the authorities under the Motor Vehicles Act.

CHEQUE BOUNCE CASE AND MONEY LENDER LICENCE

S. Parameshwarappa and Ors. vs. S. Choodappa: 2006 (4) KCCR 2685 MANU/KA/8355/2006 - wherein this Court held that merely because that a license under the provisions of the Karnataka Money Lenders Act is not obtained, the proceedings initiated for violation of Section 138 of the N.I. Act are not

barred. "Even in respect of the contention taken by the petitioners that it is a monetary transaction by way of money lending by the complainant and that he did not have the money lending license, the answer would be - this Court has already held in so far as a transaction of this nature, the question of the complainant having a money lending license with him does not arise. May be true that this Court in respect of the money lending as a matter of obligation on the part of the plaintiff in a suit for recovery of money, would insist, as a condition precedent, to have a money lending license. This is not a suit for recovery of money rather, the complainant is exercising the special powers provided under the Negotiable Instruments Act for non-payment and dis-honour of cheque which is more in a quasi civil & criminal in nature." Once the cheque is issued the accused cannot contend that it is not in respect of legally enforceable debt or else proper procedure has not been followed according to the provisions of Negotiable Instruments Act. Only if the cheque is presented after its validity period, then only such contentions would arise. Even in respect of the contention taken by the petitioners that it is a monetary transaction by way of money lending by the complainant and that he did not have the money lending license, the answer would be - this Court has already held in so far as a transaction of this nature, the question of the complainant having a money lending license with him does not arise. May be true that this Court in respect of the money lending as a

matter of obligation on the part of the plaintiff in a suit for recovery of money, would insist, as a condition precedent, to have a money lending license. This is not a suit for recovery of money rather, the complainant is exercising the special powers provided under the Negotiable Instruments Act for non-payment and dishonour of cheque which is more in a quasi civil & criminal in nature.

UNREGISTERED PARTNERSHIP FIRM IN MONEY LENDING

Balaji Finance Corporation vs. Mohammed Sab and Ors.: MANU/KA/0507/1996 - ILR 1996 KAR 3429

9. The Learned Counsel for the respondent-defendant relied on a decision in the case of **LOONKARAN SETHIA v. IVAN E. JOHN**, MANU/SC/0048/1976 : [1977]1SCR853 and submitted that the firm should be registered on the date of the transaction also. It is dear from paragraph-21 at page 347 that the Supreme Court has been pleased to observe that Section 69 of the Partnership Act is mandatory in character and its effect is to render a suit by a plaintiff in respect of right vested in him or acquired by him under a contract which he entered into as a partner of an unregistered firm, whether existing or dissolved, void. The Supreme Court has been pleased to make it dear that a partner of an erstwhile unregistered firm cannot bring a suit to enforce a right arising out of a contract falling

within the ambit of Section 69 of the Partnership Act. The Supreme Court was pleased to deal with a suit, brought by one of the partners of an unregistered partnership firm that is not the position in the instant case. In the instant case, the suit has been brought by a registered partnership firm against third parties, the third parties within the meaning of Section 69(2) of the Partnership Act.

10. The learned Appellate Judge has not properly construed the legal requirement under Section 69(2) of the Partnership Act. The judgment of the learned Appellate Judge cannot be sustained since he has committed a serious error of law.

In **Amit Desai and another v. Shine Enterprises and State MANU/AP/0776/2000 : 2000 Cr1.L.J. 2386** a Division Bench of AP High Court dealt with the issue whether a private complaint filed under Section 138 of NI Act can be quashed under Section 482 Cr.P.C. at the instance of accused on the ground that complainant- Firm was not registered under Section 69 of Partnership Act. Repelling the contention of respondent/complainant that the bar engrafted in Section 69 would be applicable against civil suits but not criminal cases the DB observed thus: "Para-13: Explanation to Section 138 of the Negotiable Instruments Act specifically laid down that the debt or other liability means a legally enforceable debt or other liability. Enforcement of legal liability has to be in the nature of civil suit because the debt

or other liability cannot be recovered by filing a criminal case and when there is a bar of filing a suit by unregistered firm, the bar equally applies to criminal case as laid down in explanation (2) of Section 138 of the Negotiable Instruments Act." In that process, the Division Bench differed with the ruling of a learned single Judge of a High Court of Kerala **Abdul Gafoor v. Abdurahiman MANU/KE/1020/1999** wherein it was held that the bar under Section 69 of Partnership Act is applicable only to civil rights but not criminal cases. **In Beacon Industries rep. by its Partner v. Anupam Ghosh MANU/KA/0541/2003** the High Court Karnataka referred several decisions including AP and Supreme Court and held that Section 69 (2) of Partnership Act has no application to criminal cases. High Court of Delhi in **Rani Kapoor v. Silvermount MANU/DE/1868/2017** have expressed the view that the bar created for maintaining the suit in Section 69 of Partnership Act by an unregistered firm cannot be stretched and applied to maintain the criminal proceedings under Section 138 of NI Act.

Division Bench of Karnataka High Court in **Gowri Containers vs. S.C. Shetty MANU/KA/7132/2007 : 2008 Cri. L.J. 498** and it was held as under: "9. Now coming to the contention of the respondents that in view of the provisions of Section 69(2) of the Indian Partnership Act, the amount under the transaction was not legally enforceable debt, reliance has been

placed by the respondents learned advocate on a Division Bench decision of Andhra Pradesh High Court in *Amit Desai and Anr. v. Shine Enterprises and Anr.* MANU/AP/0776/2000 : 2000 Criminal Law Journal 2386 wherein in respect of an unregistered partnership firm, on the ground that the suit cannot be instituted by an unregistered firm, it was held that the debt against the accused was not a legally enforceable debt. That was the case in which, the second consignment received by the complainant could not be sold and it had been returned to the accused by dispatching through a lawyer and the accused had sent a credit note to the amount and promised to return the value of the stock returned to them. In that circumstances, the accused had issued a cheque and the complaint arose out of the dishonour of that cheque. The amount under the cheque arose out of that promise of the accused to return the value of the stock. That was a case of enforcement of a right arising out of such contract. That principle is not applicable to the fact of the present case..... 10.

The Supreme Court in the case of *Kamal Pushpa Enterprises v. D.R. Construction Co.* MANU/SC/0465/2000 : AIR 2000 Supreme Court 2576 has observed that the bar to enforce rights arising from contract under Section 69(2) of the Partnership Act applies only in respect of suits and not applicable to the proceedings before the Arbitrator. In a direct decision of this Court *Beacon Industries, Rep. by Its Partner, Bangalore v. Anupam*

Ghosh the observation of this Court is that an unregistered firm is barred from filing a civil suit, but that there is no bar to initiate a private complaint for the offence punishable under Section 138 of the Negotiable Instruments Act..... 11. The words, 'legally enforceable debt or other liability' used in the explanations to Section 138 of the Negotiable Instruments Act refer to the enforceability in law of the debt or the liability in question and have no reference to the right of the person enforcing it. If there is no legal impediment for enforceability of a debt or other liability in general, disability of a particular individual or entity to enforce such right to recover such debt or liability does not render such debt or liability not legally enforceable debt or liability. The intention of the legislature is to make non payment of amounts of cheques despite service of notice as per the provisions of the Act an offence only when the cheque has been issued for payment of a legitimate debt or liability. Amount required to be paid as price of articles or goods is a legitimate debt or liability and therefore it is a legally enforceable debt or liability. The disability of an unregistered firm under Section 69(2) of the Indian Partnership Act to file a suit to enforce a right arising out of a contract does not make such debt or liability not a legally enforceable debt or liability."

HAND LOAN TO ONE OR TWO WITHOUT LICENCE

B. Sandeep vs. Venkatarami Reddy B.: MANU/KA/2252/2017

Lending hand loan to one or two persons for interest will not amount to an offence under the Karnataka Money Lenders Act, 1961 or Karnataka Prohibition of Charging Exorbitant Interest Act, 2004.

Supreme Court of India in Gajanan and Ors. v. Seth Brindaban, reported in MANU/SC/0409/1970 : AIR 1970 SC 2007 while interpreting the provisions of C.P. and Berar Money-Lenders Act, 1934, holds that money-lender means a person, who in the regular course of business advances a loan and excludes isolated transactions of money-lending.

Supreme Court of India in Kalcilda Wallang and Ors. v. U. Lokeridra Suam (dead) by Lrs., reported in AIR 1987 SC 2047 while interpreting the provisions of Assam Money-Lenders Act, 1934, holds that few disconnected and isolated transactions would not make the Plaintiff a person engaged regularly in money-lending business.

The Rajasthan High Court in Gaurishanker v. Magharam, reported in **AIR 1974 Raj 238** while interpreting Section 2(10) of the Rajasthan Money-Lenders Act, 1964, holds that an element of continuity and habit is essential to constitute the exercise of a profession or business. It is the professional money-

lender and not the casual money-lender, who alone is contemplated by Section 2(10) of the said Act.

The Madhya Pradesh High Court in *Parmanand Jain v. Firm Babulal Rajendra Kumar Jain and Anr.*, reported in **MANU/MP/0046/1976 : AIR 1976 MP 187** holds that money-lender means a person, who in the regular course of business advances a loan. The words "in the regular course of business" signify a certain degree of system and continuity of transactions. Every person, who has advanced a loan, therefore, is not a money-lender.

In **Binapani Roja v. Rabindranath Sarkar and Ors.**, reported in **MANU/WB/0055/1959 : AIR 1959 Cal 213**, Court holds that the word 'loans' in Section 2(14) of the Bengal Money-lenders Act, is in plural. Therefore, in order to establish that the Plaintiff is carrying on business of money-lending, it must be proved that he has lent money on more than one occasion.

Court in *Satyanarayan Kamal Kumar v. Birendra Pro Singh and Anr.*, reported in **MANU/WB/0049/1979 : AIR 1979 Cal 197** holds that money-lender is a person, who carries on business of money-lending in a regular course of business, but mere lender is not so.

Sitaram Poddar vs. Bhagirath Choudhary: MANU/WB /0574/2011 - 2011 (2) CHN 969 - Therefore, one or two isolated or occasional acts of lending money will not constitute a money-lending business; instances of occasional lending of money even at a remunerative rate of interest are not sufficient to constitute business of money-lending. Every loan is a debt, but every debt is not loan. Thus, by laying stress on the business trait of the lending, the Bengal Money-Lenders Act, 1940 contemplates a professional money-lender and it is in relation to such a professional money-lender that the provisions as to a licensee and registrations are applicable.

PROCEDURE OF COURTS IN SUITS REGARDING LOANS

Muniyappa and Ors. vs. Lakshmi Financiers: MANU/KA/0233/2017 - 2017 (1) KCCR 658 -

Section 24 of the KML Act 1961, which reads thus:-

'24. PROCEDURE OF COURTS IN SUITS REGARDING

LOANS - Notwithstanding anything contained in any

law for the time being in force, in any suit to which

this Act applies, (a) a Court shall, before deciding the

claim on merits, frame and decide the issue whether

the money lender has complied with the provisions of

Sections 20 and 21; (b) if the Court finds that the

provisions of Section 20 or Section 21 have not been

complied with by the money lender, it may if the

plaintiff's claim is established, in whole or in part,

disallow the whole or any portion of the interest found due as may seem reasonable to it in the circumstances of the case and may disallow costs. Explanation - A money lender who has given the receipt or furnished a statement of accounts or a pass book in the prescribed form and manner, shall be held to have complied with the provisions of Section 20 or Section 21, as the case may be, in spite of any errors and omissions if the Court finds that such errors and omissions are not material or not fraudulent."

Therefore, that is the reason why the Court has come to the conclusion that the plaintiff is not entitled for the interest at 16% pa. and therefore, it reduced the rate of interest to 9% pa. Though it has not been spelled out specifically quoting Section 24, virtually the trial Court has curtailed the rate of interest without assigning any reason. Therefore, it goes to show that the trial Court has come to the conclusion that, though the plaintiff has pleaded that he is entitled for 16%, no other reasons have been assigned as to why the Court has reduced the rate of interest from 16% pa to 9% pa. Therefore, in my opinion, though it is not specifically spelled out in the judgment, it goes without saying that the rate of interest has been reduced by the Court, therefore the said finding virtually comply the provisions of Section 24 of the KML Act.

**CIVIL SUIT FOR LOAN RECOVERY BASIC
NECESSITIES DISCUSSED**

Prakash Finance Company and Ors. vs. Chennappa Madivalappa Mulimani and Ors.: MANU/KA/5110

/2018 - 17. When a stray activity or transaction of accommodation or a friendly gesture in lending assistance may not be fitted to regular money lending.

18. It is necessary to mention that a person who carries on the business of money lending shall possess valid and proper Money Lending Licence, failing which he is not entitled for a decree. The possession of money lending licence is necessary both on the date of transaction and on the date of filing of the suit as well. The Court has to be satisfied that the money lender held valid licence not only when he advances the loan, but also when he filed the suit for recovery.

19. Learned counsel for the appellants would submit that the plaintiff is possessing money lending licence. However, it should be seen that right from the date of suit up till date, no such licence is filed and the submission to the effect of possessing of licence may not be submitted at this stage. More particularly, the point of law is, when the suit was filed by the plaintiff himself claiming he is money lender, it is the duty on his part to ensure that he has possessed licence which is valid and proper. Mere admitting the signature does not amounts to admitting of entire execution of the document. A promissory note being one of the species of negotiable instrument, need not be attested. But the monastic

operation of Ex. P.1 is in the handwriting of a person. No satisfactory explanation is given by the plaintiff as to who wrote the promissory note.

20. The plaintiff or the defendants being the parties to the contract are at liberty to write it with bonafide intention. On the other hand, it is for the plaintiff to tell who wrote the promissory note. To make the Court to understand the circumstances prevailing at the time of writing of the promissory note do not become suspicious to doubt the conduct of the plaintiff to believe his pleadings and evidence. The very documents be it register or statement, Xerox copies are filed. Further, there is no certification of accounting or auditing.

21. In the total circumstances morefully stated above, it is necessary to mention that, consideration may be past, present or future as per Section 2(d) of the Indian Contract Act, but there must be its presence which is regarded as quid pro quo or something in written. In the absence of establishing consideration, contract loses its credibility. The plaintiff filed a suit without money lending licence. He is a money lender and it is not a suit by non money lender.....

DULY STAMPED PROMISSORY NOTES

Gujjala Hanumanthappa and Ors. vs. S. Bala Rangaiah: MANU/KA/0068/1987 - ILR 1987 KAR 1201. The Court concluded that under Section 2(22),

11, 10, 35Schedule 1, Article 49Rule 5 and 13 of Stamp Rules 1925 promissory notes will have to be taken in law as duly stamped even though it might be written on an impressed paper. In the present case the pronote was written with the requisite amount on an impressed stamp paper. Hence the holding by both the courts that the pronote was duly stamped was correct. As per the evidence on record both the Plaintiff and the defendant were into flower business. Due to the foresaid evidence the loan cannot be counted within the meaning of Money Lenders Act. Hence it would be a transaction between two traders themselves.

IN WEST BENGAL MONEY LENDING WITHOUT LICENCE IS NOT ILLEGAL ACT

Jupiter Brokerage Services Ltd. vs. Ektara Exports Pvt. Ltd. and Ors. : MANU/WB/0876 /2015 Money-lending without licence is not totally barred or prohibited by the Bengal Money-Lender's Act, 1940. The Bengal Money-Lender's Act, 1940 is basically a Regulatory Act and it regulates the business of money-lending. Section 8 of the said Act says that after certain date notified in the official gazette no money-lender shall carry on the business of money-lending unless he holds an effective licence. But the provision is not mandatory. According to provision in Section 13 of the said Act, if a money-lender without having any money-lending licence files

a Suit for recovery of a loan such a Suit should be stayed until the money-lender does not pay in prescribed manner such penalty and within such period as may be fixed by the Court and if the penalty thus imposed is not paid by the money-lender/plaintiff then only the Suit should be dismissed. So, according to the provisions in Bengal Money Lender's Act, 1940, money-lending without licence is not itself an illegal Act.

MONEY LENDERS ACTS ARE TO PROTECT POOR PEOPLE FROM EXPLOITATION

Sona Chandi Oal Committee and Ors. vs. State of Maharashtra: MANU/SC/1062/2004 - AIR 2005 SC 635 - The Bombay Money-Lenders Act, 1946 was enacted during pre-independence period by the elected Government to control and regulate money lending. Money lenders were fleecing the poor peasants, tenants, agricultural labourers and salaried workers who were unable to repay loans. The agricultural debtors were losing their lands, crops or other securities to the money lenders. To arrest this exploitation, the Money-Lenders Act was enacted to improve the economic conditions of the bulk of the rural population and the poorer sections of the population in towns and cities. The object of the Act is to control the money lending business and protect the debtors from the malpractices in the business by detecting illegal money lending.

Supreme Court of India in P. Vaikunta Shenoy and company v. V.P. Had Sharma, reported in MANU/SC/8080/2007 : AIR 2008 SC 416, while interpreting the, provisions of Karnataka Money-Lenders Act, 1962, holds that the purpose of the Act was to prevent the malpractice of oppression by money-lenders to take advantage of people's poverty. In the money-lending business, the object of money-lender is to earn interest of the loan he has advanced. Therefore, a purposive interpretation has to be given to the definition of money-lenders.

State of Maharashtra and Ors. vs. Sarangdharsingh Shivdassingh Chavan and Ors.: MANU/SC/1055 /2010 (2011) 1 SCC 577 - Chief Minister of the State and as holding a position of great responsibility as a high constitutional functionary, Mr. Vilasrao Deshmukh certainly acted beyond all legal norms by giving the impugned directions to the Collector to protect members of a particular family who are dealing in money lending business from the normal process of law. This amounts to bestowing special favour to some chosen few at the cost of the vast number of poor people who as farmers have taken loans and who have come to the authorities of law and order to register their complaints against torture and atrocities by the money lenders. The instructions of the Chief Minister will certainly impede their access to legal redress and bring about a failure of the due process. ...The

aforesaid action of the Chief Minister is completely contrary to and inconsistent with the constitutional promise of equality and also the preambular resolve of social and economic justice. As a Chief Minister of the State Mr. Deshmukh has taken a solemn oath of allegiance to the Constitution but the directions which he gave are wholly unconstitutional and seek to subvert the constitutional norms of equality and social justice.The argument that some of the cases in which complaints were filed against the family of Sananda, were investigated and chargesheets were filed, is a poor consolation and does not justify the issuing of the wholly unauthorised and unconstitutional instructions to the Collector. It is not known to us in how many cases investigation has been totally scuttled in view of the impugned directions. Records disclosed in this case show that out of 74 cases only in seven cases chargesheets were filed and the rest of the cases were either compromised or withdrawn. How can poor farmers sustain their complaint in the face of such directions and how can the subordinate police officers carry on investigation ignoring such instructions of the Chief Minister? Therefore, the instructions of the Chief Minister have completely subverted the Rule of Law. Chief Minister, without verifying the truthfulness or otherwise of the assertion of Shri Dilip Kumar Sananda that false complaints were being lodged against his family members, issued instructions that complaint against the concerned

M.L.A. and his family members should be first placed before the District Anti-Money Lending Committee, which should obtain legal opinion of the District Government Pleader and then only take decision on the same and take appropriate legal action. The camouflage of sophistry used by Shri Vilas Rao Deshmukh in the instructions given by him and the affidavit filed before this Court is clearly misleading. The message to the authorities was loud and clear i.e. they were not to take the complaints against Sananda family seriously and not to proceed against them. The District Magistrate, the District Superintendent of Police and officers subordinate to them were bound to comply with the same in their letter and spirit. They could disregard those instructions at their own peril and none of them was expected to do so. The District Anti-Money Lending Committee was constituted by the Government of Maharashtra vide resolution No. MLA.1204/CR/280/C/7/S dated 19th October, 2009 for protecting the farmers against unscrupulous money lenders and not for protecting the wrong doers, but in total disregard of the scheme of the Act, the Chief Minister gave instructions which had the effect of frustrating the object of the legislation enacted for protection of the farmers. The instructions given by the Chief Minister to District Collector, Buldhana were ex facie ultra vires the provisions of the Act which do not envisage any role of the Chief Minister in cases involving violation of the provisions of the Act and amounted to an unwanted interference with the

functioning of the authorities entrusted with the task of enforcing the Act enacted for regulating, controlling transactions of money lending and protecting unsuspecting borrowers against oppression and harassment at the hands of unscrupulous money lenders.

APPLICABILITY OF KML ACT

Surendra Kumar Jain vs. Kamala Narayana Reddy and Ors.: MANU/KA/7830/2019 - Karnataka Money Lenders Act, 1961, is applicable to any suit or proceeding for recovery of a loan made after the date on which this Act comes into force; for the enforcement of any security taken, or any agreement made after the date on which the said Act comes into force in respect of any loan made either before or after the said date; or for the redemption of any security given after the date on which the said Act comes into force in respect of any loan made either before or after the said date.

EXHORBITANT INTEREST AND COMPLAINT PROCEDURE UNDER LAW

Shrimant and ors vs. State of Karnataka: MANU/KA/1576/2017 - In the petitions, along with the alleged offence under the provisions of Karnataka Money Lenders Act and also Karnataka Prohibition of Charging Exorbitant Interest Act, 2004, an offence

under Section 420 of IPC is also one of the offence, which is a cognizable offence. The alleged offences under Sections 3 and 4 of the Karnataka Prohibition of Charging Exorbitant Interest Act are also cognizable offences. When that is so, whenever it is the specific case of the prosecution that Police received the credible information for commission of cognizable offence, the Police have to enter the said information in the diaries kept in the Police Station, then they have to register the FIR before proceeding to the spot for conducting further investigation in the matter. It is the case of the prosecution that the complainant along with the staff and panch witnesses entered into the premises of the respective petitioners and they have seized the documents, but in this connection and to know the power and the procedure for such entry, inspection and seizure of the documents. it is only the Registrar and the Assistant Registrar or any other person, who is authorised by the State Government in that behalf only are the persons authorised to enter into the premises of the money lenders to inspect and seize the documents and also to verify whether the business of money lending is carried on in accordance with the provisions of money lending or not. But, admittedly, in the cases on hand, the persons entered into the premises of the alleged money lenders i.e., the petitioners/accused in the above petitions, are neither the Registrars nor the Assistant Registrars nor any person authorised by the State Government in that behalf. There is no material produced to show that the

said Police Officer was authorised by the State Government to enter into the premises in case of the alleged offence under the provisions of Karnataka Money Lenders Act. Therefore, the alleged entry into the premises of the petitioners herein is also not in accordance with the mandatory provisions of Karnataka Money Lenders Act. (Section 15) even as per the Police, a cognizable offence was committed, and without registering the FIR immediately, the further investigation of the case has been proceeded with, which is against the mandatory requirements of the provisions of Criminal Procedure Code.

Apart from that so far as the allegations that the witnesses, whose statements said to have been recorded that they are the borrowers of the loan from the above mentioned respective petitioners and stating further that the petitioners used to charge exorbitant interest (meter interest) and thereby they were molesting the poor borrowers is concerned, there is a remedy provided to the borrowers that they can follow the procedure as contemplated under Section 5 of Karnataka Prohibition of Charging Exorbitant Interest Act, which reads as under:

5. Deposit of money and presentation of petition to court and the procedure thereof.-(1) A debtor may deposit the money due in respect of a loan received by him from any person together with interest at the rate fixed by the State Government under section 28 of the Karnataka Money Lenders Act, 1961 into the Court having jurisdiction, along with a petition to record that

the amount deposited is in full or part, satisfaction of the loan including the interest therefor, as the case may be.

(2) The Court shall, on receipt of a petition under subsection (1), refer a copy of the petition to the person mentioned in the petition, directing him to give his replies within a period of fifteen days as may be granted by the Court. The Court may, after due inquiry and after considering the versions of both the parties, pass orders recording the satisfaction of the loan and interest therefor in full or in part, as the case may be.

When such procedure is contemplated, without following the said procedure, the borrowers said to have given the statement before the Investigating Officer is also cannot be considered to be proper and the procedure followed by the borrowers, in view of the above discussion and in view of the above mentioned legal infirmities in the cases, I am of the opinion that the petitioners have made out the case to allow the petitions. Accordingly, all the above petitions are allowed. The FIRs challenged by the petitioners herein in the respective petitions and the criminal proceedings initiated in criminal cases are hereby quashed."

Vijaya Kumar vs. State: MANU/KA/0994/2016 - 2016 (3) KarLJ 64 - Petitioner herein is arrayed as an accused in FIR registered by the respondent-Police in

respect of the offence punishable under Section 4 of the Karnataka Prohibition of Charging Exorbitant Interest Act, 2004 and Section 420 of Indian Penal Code, 1860. The case is registered as a suo motu report of the Head Constable of the Police Station whereby he suspects that the petitioner-accused is involved in finance business and imposing exorbitant interest. He receives blank cheques, blank stamp papers from the common people and also levy compound interest on the loan amount. Subsequent to the registration of the FIR police have seized from the premises of the petitioner certain incriminating materials like sale deeds, sale agreements, bank pass books, etc.

Under Section 157(1) of Criminal Procedure Code, 1973 permits the Police Officer to investigate and send a report forthwith to a Magistrate empowered to take cognizance and to investigate the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender. The blank cheques, Note Books recovered from his possession probabalizes that he was involved in the money lending and imposing exorbitant interest. Investigation disclose the history that he is doing money lending business.

I have gone through the investigation material. From the date of incident till now four witnesses were examined. There are some materials to show that the Investigating Officer had made some preliminary enquiry and recovered 2 blank E-stamp papers, one

stamp paper, loan agreement, note book with details of loan transaction, sale deed, blank cheque, receipts from his possession apart from his own passbook and cash. The question is from the date of registration till now it is already more than five years and none of the victims are traced. No material about any offence under Section 4 of Karnataka Prohibition of Charging of Exorbitant Interest Act is to be found from the records, at least to suspect offence under Section 420 of IPC, at the least there must be some averments in the complaint to impress basic requirement of the said provision. In the matter of *Bishan Dass v State of Punjab and Another* (2014) 15 SCC 242 : 2015 Cri. L.J. 281 (SC), has held thus: "The essential ingredients to attract Section 420 of IPC are: (i) cheating; (ii) dishonest inducement to deliver property or to make, alter or destroy any valuable security or anything which is sealed or is capable of being converted into a valuable security and (iii) mens rea of the accused at the time of making the inducement."

There is not even a scintilla of material either from the complaint or from the material borne on record that an offence as contemplated under Section 3 of the Act is committed. That being so, it is inevitable to hold that the case is registered on mere suspicion to vindicate personal vendetta lacks bona fide. In the light of the judgment of the Apex Court in the case of *State of Haryana and Others v Bhajan Lal and Others* MANU/SC/0115/1992 : AIR 1992 SC 604 : 1992 SCC (Cri.) 426 : 1992 Cri. L.J. 527 (SC) : 1992 Supp. (1)

SCC 335, it is a fit case to quash the complaint by exercising the jurisdiction of this Court under Section 482 of Cr. P.C.

**THERE MUST BE A COURSE OF DEALINGS
CARRIED WITH A PROFIT MOTIVE**

Keshava Shetty vs. T.C. Sowbhagya and Ors.:

MANU/KA/1326/2017 - Section 11 of the Act very much clear that unless licence is produced this Court cannot grant any reliefs. It is clear that merely extending loan to his colleagues that itself is not a business. The plaintiff has not proved that Ramakrishna has put signature on the pro-note. While filing the suit, Ramakrishna who has executed pro-note was no more. The suit was filed against the wife and children of the deceased. When, such is the case, the burden shifts on the plaintiff to prove. Nothing prevented the plaintiff to prove the signature of Ramakrishna by any other person. The plaintiff has not proved his case in proper perspective. The plaintiff has not established that he has obtained licence for doing money lending business. The Court below has rightly appreciated the evidence both oral and documentary evidence available on record and the Court below is right in dismissing the suit.

V. Satyanarayana vs. Sandeep Enterprises: MANU/KA/0351/2004 - ILR 2004 KAR 4505 (DB) - To say that one is money lender, he or she must carry on

business in money lending in the state and, to record an activity as business, there must be a course of dealings carried with a profit motive - In other words, money lending must be carried on as profession - If the money lending was not with profit motive or not carried on as a profession, he or she does not become a Money Lender under the Karnataka Money Lenders Act - A stray instance of lending money does not show carrying on the business of money lending as profession or with profit motive.

Even otherwise, if assumed that the cheques were issued by the petitioner/accused in the course of money lending - business, that itself does not attract the provisions contained in Karnataka Money Lenders Act. This is because, under said Act, money lender means "a person, who carried on the business of money lending" and to say that one is a money lender, he or she must carry on business in money lending in the State and, to record an activity as business, there must be a course of dealings carried with a profit motive. In other words, money lending must be carried on as profession. If the money lending was not with profit motive or, not carried on as a profession, he or she does not become a money lender under the Karnataka Money Lenders Act, as held by this Court in the case of M.N. RADHAMMA v. M.N. VENKATANARAYANAPPA MANU/KA/0148/1979 : ILR 1979 KAR 2138. So, a stray instance of lending money does not show carrying on the business of money lending as profession or with profit motive.

In the present case, there is no evidence or material on record to say that the respondent/complainant carried/carry on money lending business and consequently he comes within the meaning of the word "money lender" as defined under the Karnataka Money Lenders Act. So, admission or statement of respondent - PW.1 that he does not possess money lending licence does not come to the aid of the petitioner/accused.

CAPACITY TO LEND CANNOT BE INSISTED IN CHEQUE BOUNCE CASES

K. Damodara Naidu and Ors. vs. K. Subramani and Ors.: MANU/KA/3890/2013 - The language of Section 138 leaves no doubt that dishonour of cheque will expose the drawer to penal action but that is made subject to issuance of notice and failure on the part of the drawer to pay the amount covered under the cheque. Taking cognizance is also a subject to the provision of Section 142 of the Act which stipulates 'No court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque'

Nowhere either in Section 138 of the Act or 142 which deals with taking cognizance there is any indication that to take cognizance, complaint must contain averments about proof regarding the transaction or proof of capacity of the lender. In this

context presumption under Sections 118(a) and 139 of the Act gain importance. Section 118 deals with passing of consideration and Section 139 deals with the element of presumption regarding issuance of cheques towards discharge of legal liability.

If we were to hold that the complainant must first establish his capacity to lend, then the presumption provides under Section 139 of the Act will be rendered nugatory, and its presence in the statute book will become meaningless.

CHAPTER-3

SURETY - GUARANTOR

LEGAL VIEW OF SURETY AND GUARANTOR

Section 126 of Indian Contract Act 1872 says - about 'Contract of guarantee', Surety', 'Principal debtor' and 'creditor' -

A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default.

The person who gives the guarantee is called the 'surety';

the person in respect of whose default the guarantee is given is called the 'principal debtor',

and the person to whom the guarantee is given is called the 'creditor'.

A guarantee may be either oral or written.

CONTRACT OF SURETY HAS DIFFERENT TYPE OF CONSIDERATION

Section 127 of Indian Contract Act 1872 says- about Consideration for guarantee - Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise

to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

CONTINUING GUARANTEE

Section 129 of Indian Contract Act 1872 says - A guarantee which extends to a series of transactions is called a 'continuing guarantee'.

Illustrations

(a) A, in consideration that B will employ C in collecting the rent of B's zamindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of £100, and C pays B for it. Afterwards B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

THE PRINCIPLES OF CONTINUING GUARANTEE

Supreme Court in Sita Ram Gupta vs. Punjab National Bank &Ors., (2008) 5 SCC 711. The Court in this case has held that it is not open to a party to revoke a guarantee when he had agreed to it being a continuing one and thus would be bound by the terms and conditions of the agreement executed at the time of entering into the guarantee.

Court in Lata Construction Ltd. v. Dr. Rameshchandra and Anr. MANU/SC/0741/1999 : (2000) 1 SCC 586 whereby this Court held that if the rights under the old contract were kept alive even after the second agreement and rights under the first agreement had not been rescinded, then there was no substitution of contracts and, hence, no novation.

H.R. Basavaraj (Dead) by Lrs. and Ors. vs. Canara Bank and Ors. 2010 (12) SCC 458, MANU/SC/1785/2009 An examination of the agreement executed between the appellant Basavaraj (since deceased) and the Bank would clearly show it

to be one of a continuing guarantee. Section 129 of The Indian Contract Act, 1872 (hereinafter referred to as "the Act") defines a continuing guarantee as "A guarantee which extends to a series of transactions is called a "continuing guarantee"." Section 130 of the Act says that "A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor." A reading of the agreement clearly shows that the guarantee was to continue to all future transactions except when the guarantor disclaimed from his liability through a written statement. The deed also clearly mentions that while between the guarantor and borrower, the guarantor is only a surety; yet between the bank and the guarantor, the surety is the principal debtor and his liability would be co-extensive to that of the borrower. Accordingly, the guarantor himself waived off his rights under Chapter VIII of the Act which is conferred on a surety.

EXTENT OF RIGHTS AND LIABILITY OF SURETY

1. LIABILITY OF SURETY CO-EXISTENSIVE

Section 128 of Indian Contract Act 1872 says - Surety's liability - The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is

liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

2. RIGHT TO REVOKE

Section 130 of Indian Contract Act 1872 says -A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

Section 131 of Indian Contract Act 1872 says - The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

3. RIGHTS AND LIABILITY DEPENDS ON CONTRACT

Section 132 of Indian Contract Act 1872 says -

Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

4. DISCHARGE RIGHTS OF SURETY

Section 133 of Indian Contract Act 1872 says - Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards B and C contract, without A's consent, that B's salary shall be raised, and that he

shall become liable for one-fourth of the losses on overdrafts. B allows a customer to over-draw, and the bank loses a sum of money.

A is discharged from his surety ship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January, A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the 1st of March.

Section 134 of Indian Contract Act 1872 says - The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the

necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his surety ship.

Section 135 of Indian Contract Act 1872 says - A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Section 136 of Indian Contract Act 1872 says -

Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

Section 137 of Indian Contract Act 1872 says -

Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his surety ship.

Section 138 of Indian Contract Act 1872 says -

Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Section 44 of Indian Contract Act 1872 says -

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.

Section 139 of Indian Contract Act 1872 says - If

the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Illustrations

(a) B contracts to build a ship for C for a given sum, to be paid by installments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two installments. A is discharged by this prepayment.

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and willful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B of his guarantee.

DISCHARGE OF SURETY WHEN AND TO WHAT EXTENT

State Bank Of Saurashtra vs Chitranjan Rangnath Raja And Anr 1980 AIR 1528, 1980 SCR (3) 915

Section 141 of the Indian Contract Act under which the surety claims the relief of discharge. Section 141 reads as under: "141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security." In order to attract s. 141 it must be shown that the creditor had taken more than one security from the principal

debtor at the time when the contract of guarantee was entered into and irrespective of the fact whether the surety knew of such other security offered by the principal debtor, if the creditor loses or without the consent of the surety parts with the other security the surety would be discharged to the extent of the value of the security. In the instant case as found by the High Court and not controverted, the principal debtor had offered two securities, (i) the pledge of goods, (ii) personal guarantee of the surety. Verily, the General Manager of the Bank accepted the proposal for cash credit facility on the specific condition that the principal debtor shall offer two securities, one the pledge of goods to be kept under the lock and key of the Bank to be supervised by the Bank's employee, and secondly, the personal guarantee of the surety. The surety himself agreed to give personal guarantee on the specific understanding and with the full knowledge of the Bank that the principal debtor was offering another security, namely, pledge of goods. The surety contracted on the good faith of the principal contract when entering into contract of guarantee in which case he is deemed so to contract that both the securities would be available to the creditor (see *Sanderson v. Aston*) If the two promissory notes Exts. 81 and 30 coupled with the letter of guarantee Ext. 31 executed by the surety and the bond Ext. 83 executed by the principal debtor at one sitting on September 16, 1957, evidence one composite transaction, it is an inescapable conclusion that the principal debtor

offered two securities, one the pledge of goods and the other the personal guarantee of the surety. The surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor Bank. On this conclusion s. 141 of the Act will be indubitably attracted. Section 141 comprehends a situation where the debtor has offered more than one security one of which is the personal guarantee of the surety. Even if the surety of personal guarantee is not aware of any other security offered by the principal debtor yet once the right of the surety against the principal debtor is impaired by any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of sections 139 and 141 of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by s. 141.

In Indian Bank v. S. Krishnaswamy, AIR 1990 Mad 115, Indian Bank advanced a loan to mill, and the plaintiff stood as surety, at that point of time, the Government took over the mill, and a fresh agreement between the Government and the mill was entered into, which was not made known to the surety, and in those circumstances the surety pleaded that he is discharged from liability. Upholding the plea of the

plaintiff, the Madras High Court held that it is well settled that under Section 62 of the Contract Act, if the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed. Similarly, under Section 133 of the Contract Act any variance, made without the surety's consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance. The intentment of the provisions of Section 133 of the Contract Act is, like any other contracting party, the surety cannot be bound to do something for which he has not contracted. Even if the principal debtor and the creditor has expressly agreed to vary the terms of the original contract, and in fact, had varied the terms of the original contract, yet such variance of the terms of the original contract, cannot bind the surety unless he had assented to the new terms or variance of the original contract, made by the principal debtor and the creditor, inasmuch as upon variance of the terms of the original contract, made by the principal debtor and the creditor, the original contract, stood dissolved.

5. RIGHTS AGAINST PRINCIPAL DEBTOR AND CO-SURETIES

Section 140 of Indian Contract Act 1872 says -
Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty

has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Section 141 of Indian Contract Act 1872 says - A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations

(a) C, advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C, sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B's is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt.

Subsequently, C gives up the further security. A is not discharged.

In State of Madhya Pradesh v. Kaluram MANU/SC/0068/1966 : [1967] 1 SCR 266 Court pointedly stated that the expression "security" in the Section is not used in any technical sense; it includes all rights which the creditor has against the property on the date of the contract. "The surety is entitled on payment of the debt or performance of all that he is liable for the benefit of the rights of the creditor against the principal debtor which arise out of the transaction which gives rise to the right or liability. The surety is therefore on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. If the creditor has lost or parted with the security without the consent of the surety, the latter is by the express provision contained in Section 141, discharged to the extent of the value of the security lost or parted with."

Industrial Finance Corporation of India Ltd. vs. The Cannanore Spinning and Weaving Mills Ltd. and Ors. AIR 2002 SC 1841 - The creditor is not obliged to do anything. If the creditor does nothing and the debtor declines into bankruptcy the mortgaged securities become valueless and if the surety decamps abroad the creditor loses his money. If disaster strikes the debtor and the mortgaged securities but the surety remains capable of repaying

the debt then the creditor loses nothing. The surety contracts to pay if the debtor does not pay and the surety is bound by his contract. If the surety, perhaps less indolent or less well protected than the creditor, is worried that the mortgaged securities may decline in value then the surety may request the creditor to sell and if the creditor remains idle then the surety may bustle about, pay off the debt, take over the benefit of the securities and sell them. No creditor could carry on the business of lending if he could become liable to a mortgagee and to a surety or to either of them for a decline in value of mortgaged property, unless the creditor was personally responsible for the decline.

State Bank of Saurashtra vs. Chitranjan Rangnath Raja and Ors. AIR 1980 SC 1528

In order to attract Section 141 it must be shown that the creditor had taken more than one security from the principal debtor at the time when the contract of guarantee was entered into and irrespective of the fact whether the surety knew of such other security offered by the principal debtor, if the creditor loses or without the consent of the surety parts with the other security the surety would be discharged to the extent of the value of the security. In the instant case as found by the High Court and not controverted, the principal debtor had offered two securities, (i) the pledge of goods, (ii) personal guarantee of the surety. Verily, the General Manager of the Bank accepted the proposal for cash

credit facility on the specific condition that the principal debtor shall offer two securities, one the pledge of goods to be kept under the lock and key of the Bank to be supervised by the Bank's employee, and secondly, the personal guarantee of the surety. The surety himself agreed to give personal guarantee on the specific understanding and with the full knowledge of the Bank that the principal debtor was offering another security, namely, pledge of goods. The surety contracted on the good faith of the principal contract when entering into contract of guarantee in which case he is deemed so to contract that both the securities would be available to the creditor

10. If the two promissory notes Exts. 81 and 30 coupled with the letter of guarantee Ext. 31 executed by the surety and the bond Ext. 83 executed by the principal debtor at one sitting on September 16, 1957, evidence one composite transaction, it is an inescapable conclusion that the principal debtor offered two securities, one the pledge of goods and the other the personal guarantee of the surety. The surety in good faith contracted to offer personal guarantee on the clear understanding that the principal debtor has offered security by way of pledge of goods and the goods were to be in the custody of the creditor Bank. On this conclusion Section 141 of the Act will be indubitably attracted. Section 141 comprehends a situation where the debtor has offered more than one security one of which is the personal guarantee of the surety Even if the surety of personal guarantee is not

aware of any other security offered by the principal debtor yet once the right of the surety against the principal debtor is impaired by any action or inaction, which implies negligence appearing from lack of supervision undertaken in the contract, the surety would be discharged under the combined operation of Sections 139 and 141 of the Act. In any event, if the creditor loses or without the consent of the surety parts with the security, the surety is discharged to the extent of the security lost as provided by Section 141.

Indian Bank, Sardar Patel Road, ... vs Mrs. M. Ambika And Others - 2001 (1) KarLJ 478 - Section 141 of the (Indian) Contract Act, 1872 referred to above, confers right on the surety to take the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is/has been entered into. It provides that it is immaterial whether the surety knows of the existence of such security or not. The securities which the creditor has got against the principal debtor at the material time when the contract of surety was entered into, the surety will be entitled to take benefit of those securities. This section further provides that if the creditor loses or parts with the security or any part thereof, without the consent of the surety, then the liability of the surety stands discharged to the extent of the value of the surety that has been lost. It means, if some valuable security has been provided to the creditor against the principal debtor, may be in the

form of hypothecation, but if the creditor loses the same whether on account of his negligence or on account of inaction in keeping with the security into existence, then the surety may get discharged. The use of expression "creditor has" is indicative of the intention of the Legislature that the security provided by the principal debtor to the creditor must be in his possession and control may be either direct, actual or constructive. If the creditor has the control and possession either direct, actual or constructive, of the securities then if he loses as mentioned earlier, the surety gets discharged. If he does not prove or show that the securities provided by the principal debtor to the creditor had been given or placed under the possession or control of the creditor, but instead it remain in the possession and effective control only of the principal debtor and during that period when it is lost the surety may not be discharged, because then it may not be a case of creditor losing or parting with the security. The factual position depends upon the terms of the agreement.

6. RIGHTS OF INDEMNITY

Section 145 of Indian Contract Act 1872 says - In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

Section 125 of Indian Contract Act 1872 says - The promise in a **contract of indemnity**, acting within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promise to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

7. RIGHTS BETWEEN CO-SURETIES

Section 146 of Indian Contract Act 1872 says -

Where two or more persons are co- sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts; and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B

and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

Section 147 of Indian Contract Act 1872 says - Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are liable to pay 10,000 rupees.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

8. SURETY'S RIGHT TO REDEEM MORTGAGED PROPERTY

Section 91 of the Transfer of property Act reads as under:

"Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely:--

- (a) any person (other than the mortgagee of the interest thought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;
- (b) any surety for the payment of the mortgage-debt or any part thereof; or
- (c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property."

Section 92 of the Transfer of property Act reads as under: Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage,

have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

INVALIDITY CIRCUMSTANCES OF GUARANTEE

Section 142 of Indian Contract Act 1872 says - Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Section 143 of Indian Contract Act 1872 says - Any guarantee which the creditor has obtained by means

of keeping silence as to material circumstances is invalid.

Illustrations

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

Section 144 of Indian Contract Act 1872 says -

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

SURETY CAN WAIVE OFF HIS RIGHTS

T. Raju Shetty vs. Bank of Baroda, AIR 1992 KARNATAKA 108, "In a case where the creditor chooses to proceed against the principal debtor and the sureties jointly and severally and the suit abates against the principal debtor, the suit cannot be

decreed against the sureties because in respect of the same subject matter of the suit, there will be two conflicting decrees." whereby it had also been held that surety can waive off his rights under various provisions of Chapter VIII of the Contract Act. It is further observed that it is in line with long established precedents that anyone has a right to waive the advantages offered by law provided they have been made for the sole benefit of an individual in his private capacity and does not infringe upon the public right or public policy. This principle was reiterated in *Lachoo Ma! Vs. Radhey Shyam*, (1971) 1 SCC 619.

Chapter VIII of the Indian Contract Act, 1872, (hereinafter referred to as the 'Act') deals with indemnity and guarantee. Section 124 defines the expression "Contract of indemnity"; Section 125 defines "right of indemnity holder when sued"; Section 126 defines the expressions "Contract of Guarantee", "Principal Debtor" and "Debtor"; Section 127 provides regarding the consideration for guarantee; Section 128 deals with "Surety's liability"; Section 129 states to as the "Continuing Guarantee"; Sections 130 and 131 deal with revocation of continuing guarantee by surety's death respectively; Sections 132, 133, 134, 135 and 136 deal with liability of the sureties and discharge of their liabilities; Section 137 provides that the creditor's forbearance to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary discharge the surety; Section 138 provides

that where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free surety so released from his responsibility to the other sureties; Section 139 deals with the discharge of surety by creditor's act or omission impairing surety's eventual remedy; Section 140 and 141 deal with the rights of surety on payment of performance and surety's right to benefit of creditor's securities respectively; Section 142 to 144 deal with the guarantee; Section 145 deals with the implied promise to indemnify surety; Section 146 deals with co-sureties liable to contribute equally and lastly Section 147 deals with liability of co-sureties bound in different sums. Thus, it is relevant to notice that all these provisions pertaining to surety and guarantee and the principal debtor have to be read together and not in isolation. Section 128 of the Act specifically provides-that the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. In the other provisions contained in Chapter VIII relating to the rights of the sureties, we do not find the words 'unless it is otherwise provided by the contract' or 'subject to the contract as may be arrived at by the parties'. Therefore, different views are expressed by the High Courts as to whether it is open to contract outside the provisions of Chapter VIII of the Act pertaining to rights of the sureties.

Housing development and finance corporation vs. Gautam kumar nag and others [2012 (5) SCC 604],

Paras 12 and 13 of the said judgment read as under:

"12. The two respondents executed identical deeds of guarantee of which Clauses (2) and (3) read as follows:

"(2) I hereby accord my consent to the terms of the said loan agreement and/or any instrument or instruments that may hereafter be executed by the borrower(s) in your favour as aforesaid, being by mutual consent between you and him/them in any respect varied or modified without requiring my consent or approval thereto and I agree that my liability under this guarantee shall in no manner be affected by such variations and modifications and I expressly give up all my rights as surety under the provisions of the Contract Act, 1872 in that behalf.

(3).....

13. In light of the expressed stipulations, in the guarantee, any reliance on Section 139 of the Contract Act is evidently futile and of no avail. In our view, therefore, the impugned judgment of the High Court is unsustainable and is fit to be set aside. We, accordingly, set aside the impugned judgment of the High Court and restore the order and decree passed by the trial Court."

Canara Bank and Ors. vs. Muraj Enterprises and Ors. MANU/KA/3784/2018 (DB). The provisions of Sections 133, 134, 135, 139 and 141 of the Indian Contract Act, 1872 give discharge to the sureties in

certain circumstances that impair their rights. The Apex Court in its judgment in the case of HOUSING DEVELOPMENT AND FINANCE CORPORATION v. GAUTAM KUMAR NAG AND OTHERS [MANU/SC/0043/2012 : 2012 (5) SCC 604], has held that these rights can be contracted away or waived by the parties to the contract. Mr. D.L.N. Rao is justified in his submission that there is a term in the loan agreement/contract of guarantee which reads as under: "... the Guarantor agrees that as between the Bank and the Guarantor, the Guarantor is the principal debtor, jointly with the Borrower and accordingly the Guarantor shall not be entitled to any of the rights conferred as surety by section 133, 134, 135, 139 and 141 or any other relevant provision of the Contract Act. Thus, assuming that the circumstances mentioned by the DRAT at para 17 of its impugned judgment are true, still the respondent sureties having waived their rights under Sections 133, 134, 135, 139 and 141 of the Indian Contract Act or any other law could not have pleaded their discharge altogether from suretyship/guarantee. A perusal of the provisions of Sections 139 and 141 of the Indian Contract Act shows that the surety is discharged only when the creditor does any act which is inconsistent with the right of the surety or the creditor omits to do any act which under law or the contract of guarantee he is obliged to do. In the totality of the circumstances of the case, it is too much to expect the petitioner banks to have taken the

possession of the vessel in question for the purpose of preserving its value when such preservation would have cost them very high and that the game would not have been worth the candle. The banks appear to have done what a prudent person would have done in the given circumstances. However, this again is a matter to be considered by the DRAT itself after hearing the parties.

Ibrahim Abdul Latif Shaik v. Corporation bank, Karwar and Others (MANU/KA/0511/2002 : AIR 2003 KARNATAKA 98), para 8 of which reads as under: "No doubt, under the Contract Act, it is within the domain of the parties to stipulate the logistic details of the performance and execution of the contract agreed upon. In the normal course, it is in the discretion of the creditor to choose the time and situation to proceed against the securities. However, by a contract, it is permissible for the parties to stipulate the contingencies and situation as to when the creditor shall proceed against the securities and if there is any such clear stipulation with regard to the contingencies under which the creditor has to proceed and if there is a failure, it would necessarily be assumed to result in impinging the rights of surety. In the present case, it is the contention of the appellant, that despite the insistence and notice under Ex. D.1, the plaintiff bank did not proceed against the security. As a result value diminished otherwise the loan would have been fully satisfied with the securities available.

In the light of the ratio laid down by the Division Bench of this court referred to above, it is not within the right of the appellant Guarantor to insist to proceed against the security at the time pointed out by him in the absence of specific contract to that effect. There is nothing to show that under the contract, the plaintiff bank had conceded to act against the security at the insistence of the guarantor. In the absence of such contractual obligation, it is impermissible for the appellant to contend that there is failure on the part of the bank in not proceeding against the security at the appropriate time pointed by him."

Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly
MANU/SC/0439/1986 : (1986) 3 SCC 156. The

relevant portion in paragraph No. 18 of the said judgment reads as under: ".... This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker

party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be.....

Corporation Bank vs Mohandas Baliga ILR 1993

KAR 201 (DB) Thus from the aforesaid Decision it is clear that the provisions contained in Sections 23, 128, 133, 134, 135, 139 and 141 of the Contract Act have been considered and it has been held that the agreement of surety is also like any other agreement, it is open to the person to give up his right under a contract or under any law. Similarly, the surety also can give up his right and the act of giving up of the right arising under the provisions of the Contract Act by a surety, does not amount to an act contrary to Section 23 of the Contract Act and as such it would not be opposed to public policy.

SURETY'S RIGHT OF SUBROGATION

Section 140 of the Contract Act, 1872, deals with the principle of subrogation with reference to the rights of a surety or guarantor, thus: "140. Rights of surety on

payment or performance.--Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that is liable for, is invested with all the rights which the creditor had against the principal debtor."

The principles relating to subrogation have been summarized by a five judge bench of the Apex Court, in the case of **Economic Transport Organization, Delhi vs. Charan Spinning Mills Private Limited and Another MANU/SC/0113/2010 : (2010) 4 SCC 114**, thus:

"(1) Equitable right of subrogation arises when the insurer settles the claim of the assured, for the entire loss. When there is an equitable subrogation in favour of the insurer, the insurer is allowed to stand in the shoes of the assured and enforce the rights of the assured against the wrongdoer.

(ii) Subrogation does not terminate nor puts an end to the right of the assured to sue the wrongdoer and recover the damages for the loss. Subrogation only entitles the insurer to receive back the amount paid to the assured, in terms of the principles of subrogation.

(iii) Where the assured executes a letter of subrogation, reducing the terms of subrogation, the rights of the insurer vis-à-vis the assured will be governed by the terms of the letter of subrogation.

(iv) A subrogation enables the insurer to exercise the rights of the assured against third parties in the name of the assured. Consequently, any plaint, complaint or

petition for recovery of compensation can be filed in the name of the assured, or by the assured represented by the insurer as subrogee-cum-attorney, or by the assured and the insurer as co-plaintiffs or co-complainants.

(v) Where the assured executed a subrogation-cum-assignment in favour of the insurer (as contrasted from a subrogation), the assured is left with no right or interest. Consequently, the assured will no longer be entitled to sue the wrongdoer on its own account and for its own benefit. But as the instrument is a subrogation-cum-assignment, and not a mere assignment, the insurer has the choice of suing in its own name, or in the name of the assured, if the instrument so provides. The insurer becomes entitled to the entire amount recovered from the wrongdoer, that is, not only the amount that the insurer had paid to the assured, but also any amount received in excess of what was paid by it to the assured, if the instrument so provides."

WHETHER GUARANTOR CAN ISSUE CHEQUE FOR THE DEBT OF BORROWER

In ICDS Ltd. Vs. Beena Shabeer & Another (2002) 6 SCC 426, cheque issued by the guarantor to discharge the debt of principal borrower was in question. High Court held that being a cheque from the guarantor it could not be said to have been issued for the purpose of discharging any debt or liability.

Supreme Court while reversing this finding held as under: "Any cheque" and "other liability" are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. Any contra- interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus do not lend any assistance to the contentions raised by the respondents.

In Komalam Gopi vs. T.K. Mohankumar and Anr. MANU/KE/0504/2008, wife had issued a cheque in favour of payee in discharge of liability of her husband. Plea taken by her that ingredients of offence under Section 138 of the Act were not attracted, since she had not issued the cheque in discharge of her liability, was rejected.

Pooja Ravinder Devidasani vs. State of Maharashtra MANU/SC/1177/2014 : AIR 2015 SC 675 : (2014) 16 SCC 1 - Appellant is merely a housewife who was appointed as a Non-Executive Director of M/s. Elite International Private Ltd. and had no active role in the conduct of business of the Company, particularly in the issuance of the cheques

in question. As a matter of fact, the Appellant had resigned as the Director much before the issuance of the cheques in question, her resignation was also approved by the Board of Directors in the meeting held on 17th December, 2005. The resignation of the Appellant as Director of M/S Elite International Pvt. Ltd. has also been informed to the Registrar of Companies by Form No. 20B Under Section 159, Schedule V, Part II of the Companies Act, 1956 when the annual return for the year ending on 31st March, 2006 was filed. The trade facility was sanctioned by the Respondent No. 2 on 19th January, 2005 as per the Letter of Guarantee executed by the Appellant on the same date. The effective date of resignation of the Appellant as Director of the Company was 17th December, 2005. With the result of approval of her resignation by the Board of Directors, the Appellant ceased to play any role in the activities of the Company. The Cheques in question were issued by the Company in the year 2008 i.e. about two and half years after resignation of the Appellant as Director. This fact itself emphasizes that the Appellant was not involved in the affairs of the Company when the Cheques were issued and had no role either in the conduct of the business of the Company or in issuing the Cheques.

Learned Counsel submitted that to fasten vicarious liability it is necessary Under Section 141 of the N.I. Act that the complainant must aver and prove how and in what manner the Appellant was responsible in

the conduct of the business of the Company. The complainant shall also state in the light of proviso to Section 141(1), in what capacity the Appellant was in charge of day to day affairs of the default Company at the relevant time, particularly when cheques were issued. Respondent No. 2 (complainant) did not fulfill these prerequisites contemplated by the Act but sought to impute the Appellant with vicarious liability only on account of the fact that the Appellant had attended the Board Meeting of M/S Elite International Pvt. Ltd. held on 14th August, 2004. In that meeting, the Board of Directors authorized another Director to execute necessary documents in connection with trade finance facility from Respondent No. 2. The mere presence of the Appellant in the Board Meeting on 14th August, 2004 would not amount to an offence punishable Under Section 138 of the N.I. Act. Merely arraying a Director of a Company as an accused in the Complaint and making a bald or cursory statement without attributing any specific role, that the Director is responsible for the conduct of the business would not make a case of vicarious liability against a Director of the company Under Section 141 of the N.I. Act. Similarly, simply stating that the Appellant was in charge of the affairs of the Company would not be sufficient to justify the allegation Under Section 138 of the N.I. Act. In other words, the complainant must explain the role specifically attributable to the Appellant in the commission of the offence.

Supreme court held that, "So far as the Letter of Guarantee is concerned, it gives way for a civil liability which the Respondent No. 2--complainant can always pursue the remedy before the appropriate Court. So, the contention that the cheques in question were issued by virtue of such Letter of Guarantee and hence the Appellant is liable Under Section 138 read with Section 141 of the N.I. Act, cannot also be accepted in these proceedings. ... Putting the criminal law into motion is not a matter of course. To settle the scores between the parties which are more in the nature of a civil dispute, the parties cannot be permitted to put the criminal law into motion and Courts cannot be a mere spectator to it. Before a Magistrate taking cognizance of an offence Under Section 138/141 of the N.I. Act, making a person vicariously liable has to ensure strict compliance of the statutory requirements. The Superior Courts should maintain purity in the administration of Justice and should not allow abuse of the process of the Court. The High Court ought to have quashed the complaint against the Appellant which is nothing but a pure abuse of process of law.

LIABILITY OF SURETY AND PRINCIPAL

Bank Of Bihar Ltd vs Damodar Prasad & Anr 1969 AIR 297, 1969 SCR (1) 620 In the absence of some special equity the surety has no right to restrain execution against him until the creditor has

exhausted his remedies against the principal. For making an order under O. XX r. 11 (1) of C.P.C. the court must give specific reasons. The direction postponing payment of the amount decreed must be clear and specific. The injunction upon the creditor not to proceed against the surety until the creditor has exhausted his remedies against the principal was of the vaguest character. It was not stated how and when the creditor would exhaust his remedies against the principal. Court considered and answered in affirmative the question whether the bank is entitled to recover its dues from the surety and observed: It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under s. 140 of the Indian Contract Act. and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down.

Supreme Court in State Bank of India v. Saksaria Sugar Mills Ltd., AIR 1986 SC 868 : held that under Section 128 of the Indian Contract Act, 1872, save as provided in the contract, the liability of the surety is co-extensive with that of the principal debtor. The

sureties thus became liable to pay the entire amount. Their liability was immediate and it was not deferred until the creditor exhausted his remedies against the principal debtor.

Court in Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam & Anr., AIR 1982 SC 1497 where the liability of the guarantor in a case where liability of the principal debtor was discharged under the insolvency law or the company law, was considered. It was held in this case that in view of the unequivocal guarantee such liability of the guarantor continues and the creditor can realize the same from guarantor in view of the language of Section 128 of the Contract Act as there is no discharge under Section 134 of that Act.

Apex Court in Union Bank of India v. Manku Narayanan (AIR 1987 SC 1978). There the Apex Court held that in cases of decree covered by mortgage, the creditor/deedee holder has to initially proceed against the mortgaged property and could then only proceed against the guarantor. However, in *State of Bank of India v. M/s.Indexport Registered* (AIR 1992 SC 1740) the three Judge Bench of the Apex Court held that Manku Narayanan' case (supra) was not correctly decided. It would be appropriate to quote certain observations of the Apex Court in *State of Bank of India v. M/s.Indexport Registered* ".....It is the right of the deedee holder to proceed with it in a

way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

In Stale Bank of India v. Messrs Indexport Registered, AIR 1992 SC 1740, Hon'ble Supreme Court relying upon the observations of Bank of Bihar Ltd. v. Damodar Prasad, AIR 1969 SC 297, observed that Manku Narayana's case AIR 1987 SC 1078 (supra) was not correctly decided. It was observed: "Where the money decree was against all the defendants including the guarantor and a mortgage decree against one of the defendants who had mortgaged the shop with the plaintiff bank, so far as the said shop was concerned and the decree did not put any feller on the right of the decree holder to execute it against any party whether as a money decree or as a mortgage decree, the decree-holder would be entitled to proceed against the guarantor first for the execution of the decree. Moreover, it is the right of the decree holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that the liability of the surety is co-extensive with that of the principal debtor, Unless it is otherwise provided by the contract. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree holder to proceed against the mortgaged property first

and then to proceed against the guarantor. In such a case, when the sadi decree had become final all pleas as to the rights which the guarantor had had to be taken during trial and not after the decree while execution is being levied".

In A.P. State Financial Corporation v. M/s. Gar Rolling Mills (AIR 1994 SC 2151), the Apex Court has held that the defaulter does not have any legal or even a moral right to object to the mode of recovery taken by the creditor in accordance with law. It was held that there is no equity in favour of a defaulting party which may justify interference by the courts in exercise of its equitable extraordinary jurisdiction under Article 226 of the Constitution of India to assist it in not repaying its debts. The aim of equity is to promote honesty and not to frustrate the legitimate rights of the Corporation (in that case Financial Corporation) which after advancing the loan takes steps to recover its dues from the defaulting party. If there are several remedies available for the creditor, it is the choice of the creditor as to which remedy it is to pursue. Neither the defaulter nor the guarantor could compel the creditor to take recourse to any particular form of remedy or as against particular security. That falls within the exclusive domain of the creditor. The said view has been reinforced by the Apex Court in a series of decisions including Industrial Investment Bank of India Ltd. v. Biswanath Jhunjunwala ([2009] 9 SCC 478), United Bank of India v. Satyawati Tondon and

Others ([2010] 8 SCC 110), Ram Kishan v. State of U.P. ([2012] 11 SCC 511) and Central Bank of India v. Vimla ([2015] 7 SCC 337)

In Hukumchand Insurance Co. Ltd. v. Bank of Baroda, AIR 1977 Karnataka 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety viz-a-viz the principal debtor. Venkatchaliah, J. (as His Lordship then was) observed (Para 12):- "The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is co-extensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

In Bihar State Electricity Board Patna v. M/s. Green Rubber Industries, (1990) 1 S CC 731 : (AIR 1990 SC 699), Hon'ble Supreme Court in para 23 of the report observed (Para 21, at p. 705 of AIR); "It is settled law that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though

he is ignorant of the precise legal effect. In view of clause (4) having formed one of the stipulations in the contract along with others ilicannol be said to be nudum paclum and the maxim nudum pactum ex quo non oritur actio does not apply. Considered by the test of reasonableness, it cannot be said to be unreasonable inasmuch as, the supply of electricity to a. consumer involves incurring of overhead installation expenses by the Board which do not vary with the quantity of electricity consumed and the installation has to be continued irrespective of whether the energy is consumed or not until the agreement comes to an end.

It was further indicated; "Every contract is to be considered with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavoring to called the intention of the parties, even though the immediate objection of enquiry is the meaning of an isolated clause. This agreement with the stipulation of minimum guaranteed charges cannot be held to be ultra vires on the ground that it is incompatible With the statutory duty."

In Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills, 2002 (2) ALD 89 (SC) = 2002 (1) Supreme 402, the Apex Court while dealing with the power of the Corporation under Section 29 of the Act held that the Corporation has power to sell the unit seized for default in payment of loan and the

decision of the Corporation to sell the same cannot be reviewed as an appellate Court.

Supreme Court in State Bank of India Vs. V. Ramakrishnan and another AIR 2018 SC 3876, -

Section 14 of the IBC, which was introduced with effect from 06.06.2018 by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018, whereby Section 14(3) was amended, in which it is stated that the provisions of sub-section (1) shall not apply to: (a) such transaction as may be notified by the Central Government in consultation with any financial regulator and (b) a surety in a contract of guarantee to a corporate debtor. The present appeals revolve around whether Section 14 of the Insolvency and Bankruptcy Code, 2016, which provides for a moratorium for the limited period mentioned in the Code, on admission of an insolvency petition, would apply to a personal guarantor of a corporate debtor. A contract of guarantee is between the creditor, the principal debtor and the surety, where under the creditor has a remedy in relation to his debt against both the principal debtor and the surety..... The surety here may be a corporate or a natural person and the liability of such person goes as far the liability of the principal debtor. As per section 128 of the Indian Contract Act, 1872, the liability of the surety is co-extensive with that of the principal debtor and the creditor may go against either the principal debtor, or the surety, or both, in no

particular sequence.....Though this may be limited by the terms of the contract of guarantee, the general principle of such contracts is that the liability of the principal debtor and the surety is co-extensive and is joint and several.....The Committee noted that this characteristic of such contracts i.e. of having remedy against both the surety and the corporate debtor, without the obligation to exhaust the remedy against one of the parties before proceeding against the other, is of utmost important for the creditor and is the hallmark of a guarantee contract, and the availability of such remedy is in most cases the basis on which the loan may have been extended. The assets of the surety are separate from those of the corporate debtor, and proceedings against the corporate debtor may not be seriously impacted by the actions against assets of third parties like sureties. Additionally, enforcement of guarantee may not have a significant impact on the debt of the corporate debtor as the right of the creditor against the principal debtor is merely shifted to the surety, to the extent of payment by the surety..... The Committee concluded that Section 14 does not intend to bar actions against assets of guarantors to the debts of the corporate debtor and recommended that an explanation to clarify this may be inserted in Section 14 of the Code. The scope of the moratorium may be restricted to the assets of the corporate debtor only..... The Report of the said Committee makes it clear that the object of the amendment was to clarify and set at rest what the

Committee thought was an overbroad interpretation of Section 14. That such clarificatory amendment is retrospective in nature.

SURETY HAS NO RIGHT TO DICTATE TERMS OF RECOVERY

Hon'ble Supreme Court in Ram Kishun and others vs State of Uttar Pradesh and others, (2012) 11 SCC 511, wherein it was held as under: "10. There can be no dispute to the settled legal proposition of law that in view of the provisions of Section 128 of the Indian Contract Act, 1872 (hereinafter called the 'Contract Act'), the liability of the guarantor/surety is co-extensive with that of the debtor. Therefore, the creditor has a right to obtain a decree against the surety and the principal debtor. The surety has no right to restrain execution of the decree against him until the creditor has exhausted his remedy against the principal debtor for the reason that it is the business of the surety/guarantor to see whether the principal debtor has paid or not. The surety does not have a right to dictate terms to the creditor as how he should make the recovery and pursue his remedies against the principal debtor at his instance. (Vide: The Bank of Bihar Ltd. v. Dr. Damodar Prasad and Anr., 1969 AIR(SC) 297 Maharashtra State Electricity Board, Bombay v. The Official Liquidator, High Court, Ernakulam and Anr., 1982 AIR(SC) 1497 Union Bank of India v. Manku Narayana, 1987 AIR(SC) 1078 and

State Bank of India v. Messrs. Indexport Registered and Ors., 1992 AIR(SC) 1740.

Ram Kishun and Ors. vs. State of U.P. and Ors.:
MANU/SC/0494/2012 - AIR 2012 SC 2288 - In view of the above, the law can be summarised to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is co-extensive with that of principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud.

BANK NEGLIGENCE IN INSPECTING & ACCOUNTING HYPOTHECATED GOODS

Indian Bank, Sardar Patel Road, ... vs Mrs. M. Ambika And Others - 2001 (1) KarLJ 478 - A reading of the agreement and the above mentioned clauses coupled with other clauses thereof, reveals that the goods hypothecated were no doubt placed under the control and supervision of the Bank, but, the actual possession remained with the borrower, who had also to carry on the business, but the power had been given to the Bank to inspect, to take accounts, to evaluate

the goods hypothecated and the goods taken in stock, as well as, to issue directions to the borrower in the matter of use or sale of goods stored in the godown and any other matters relating thereto and that the borrower in whose actual possession the goods were, was held was allowed to hold not in his own right the hypothecated properties, but in trust for the Bank and to act as an agent of the Bank and also to act as per the directions and control of the Bank itself. The Bank had to exercise those powers, supervise and control over it. From the perusal of the document, these powers were conferred on the Bank to see that the goods be available at the time when the security has to be enforced. However, if the powers are conferred and the corresponding duties are not followed the damage is bound to be caused. The person or authority on whom the powers are conferred is expected to exercise those powers and perform the duties which may be necessary for the purpose of fulfilment of the object for which the power has been conferred. In this case, the properties hypothecated has been put or placed under the control and supervision of the Bank. It had also been given power in the circumstances mentioned to take actual possession of the properties/goods, such as when securities were lost because action of principal debtor it was really lost because of the negligence and inaction of the creditor i.e., the Bank also. A complete perusal of the agreement clearly reveals that it is a misconception to say that the Bank was not in actual

possession of the goods hypothecated. The correct is that plaintiff-bank was in possession of those goods/securities and was acting through its agent and the borrower who was in actual possession and dealt with the goods hypothecated was acting, as per the agreement between the borrower and the Bank, as bank's agent and in accordance with the terms of the agreement and the directions issued by the Bank from time to time. Therefore, the Bank even if was not in actual possession, it was in constructive possession of the properties through its agent, having the full rights and control over the properties hypothecated. Therefore, it was the duty of the Bank to have been vigilant in the matter of control and supervision with reference to the hypothecated goods as securities which the Bank placed and allowed those goods to continue with the borrower acting as an agent of the Bank. In such circumstances, the Bank has failed to exercise those powers conferred under the agreement and because of that negligence, inaction and lack of proper supervision of the goods/properties hypothecated and subject-matter of the agreement by Bank goods were lost. For the negligence or inaction on the part of the Bank, the surety/guarantor cannot be blamed and the surety cannot be deprived of the benefit of Section 141 of the Contract Act. Because of the lack of proper supervision and control by the Bank being exercised by it over the hypothecated goods under Exts. P. 2 and P. 6 and the securities were lost, the surety, can well be said under Section 141 of the

Contract Act, to have stood discharged to the extent of the value of the security lost.

GUARANTOR'S LIABILITY DEPENDS UPON TERMS OF CONTRACT

Hon'ble Supreme Court in the case of SYNDICATE BANK v/s CHANNAVEERAPPA BELERI AND OTHERS reported in (2006) 11 SCC 506.

Paragraphs 9 to 11 of the said decision read as follows:

"9. A guarantor's liability depends upon the terms of his contract. A "continuing guarantee" is different from an ordinary guarantee. There is also a difference between a guarantee which stipulates that the guarantor is liable to pay only on a demand by the creditor, and a guarantee which does not contain such a condition. Further, depending on the terms of guarantee, the liability of a guarantor may be limited to a particular sum, instead of the liability being to the same extent as that of the principal debtor. The liability to pay may arise, on the principal debtor and guarantor, at the same time or at different points of time. A claim may be even time-barred against the principal debtor, but still enforceable against the guarantor. The parties may agree that the liability of a guarantor shall arise at a later point of time than that of the principal debtor. We have referred to these aspects only to underline the fact that the extent of liability under a guarantee is also the question as to

when the liability of a guarantor will arise, would depend purely on the terms of the contract.

10. Samuel, no doubt, dealt with a continuing guarantee. But the continuing guarantee considered by it, did not provide that the guarantor shall make payment on demand by the Bank. The continuing guarantee considered by it merely recited that the surety guaranteed to the Bank, the repayment of all money which shall at any time be due to the Bank from the borrower on the general balance of their accounts with the Bank, and that the guarantee shall be a continuing guarantee to an extent of Rs.10 lakhs. Interpreting the said continuing guarantee, this Court held that so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, the period of limitation could not be said to have commenced running.

11. But in the case on hand, the guarantee deeds specifically state that the guarantors agree to pay and satisfy the bank on demand and interest will be payable by the guarantors only from the date of demand. In a case where the guarantee is payable on demand, as held in *Bradford and Hartland*, the limitation begins to run when the demand is made and the guarantor commits breach by not complying with the demand."

The Hon'ble Apex Court in the case of Syndicate Bank vs Channaveerappa Beleri and other - 2006

(11) SCC 506 - has considered the meaning of the phrase "on demand" and held that when a contract of guarantee is clear that the guarantor's liability would arise only when the demand is made, the right to sue to the creditor accrues only when a demand for payment is made by the creditor and is refused by the guarantors. When a demand is made requiring payment within a stipulated period, the breach occurs or the right to sue accrues, if payment is not made within the stipulated period. If while making the demand for payment, no period is stipulated within which the payment should be made, the breach occurs or the right to sue accrues when the demand is served on the guarantor. The Hon'ble Apex Court has concluded thus: "We have to however enter a caveat here. When the demand is made by the creditor on the guarantor, under a guarantee which requires a demand, as a condition precedent for the liability of the guarantor, such demand should be for payment of a sum which is legally due unrecoverable from the principal debtor. If the debt had already become time-barred against the principal debtor, the question of creditor demanding payment thereafter, for the first time, against the guarantor would not arise. When the demand is made against the guarantor, if the claim is a live claim (that is, a claim which is not barred) against the principal debtor, limitation in respect of the guarantor will run from the date of such demand and refusal/non-compliance. Where guarantor becomes liable in pursuance of demand validly made

in time, the creditor can sue the guarantor within 3 years, even if the claim against the principal debtor gets subsequently time barred". To clarify the above, the following illustration may be useful: Let us say that a creditor makes some advances to a borrower between 10.4.1991 and 1.6.1991 and the repayment thereof is guaranteed by the guarantor undertaking to pay on demand by the creditor, under a continuing guarantee dated 1.4.1991. Let us further say a demand is made by the creditor against the guarantor for payment on 1.3.1993. Though the limitation against the principal debtor may expire on 1.6.1994, as the demand was made on 1.3.1993 when the claim was 'live' against the principal debtor, the limitation as against the guarantor would be 3 years from 1.3.1993. On the other hand, if the creditor does not make a demand at all against the guarantor till 1.6.1994 when the claims against the principal debtor get time-barred, any demand against the guarantor made thereafter say on 15.9.1994 would not be valid or enforceable.

T. Raju Setty vs Bank of Baroda - AIR 1992 Kar 108

- "We are of the view that as the provisions contained in Chapter VII of the Act relating to Indemnity and Guarantee, they deal with one subject and they are to be read together. The liability of the surety as stated in general terms in section 128 of the Act is no doubt coextensive with that of the principal debtor, but this liability is also subject to the terms of the contract;

because section 128 of the Act itself specifically provides that the liability of a surety is coextensive with that of the principal debtor unless it is otherwise provided by the contract. Thus the liability of the surety is subject to the terms of the contract as may be arrived at between the parties. The words "unless it is otherwise provided in the contract" occurring in section 128 of the Act will also govern the other provisions contained in Chapter VIII of the Act and enable the surety to give up the rights available to him under sections 133, 134, 135 139 and 141 of Act. It is a settled legal position of law that a legal right can be given up provided such giving up of a legal rights under any contract is not hit by section 23 of the Act. Section 133 of the Act makes it clear that any variance made in the contract between the principal debtor and the creditor without the consent of the surety, discharges the surety as to the transactions subsequent to variance. This consent of the surety can be obtained either at the time the contract is made between the principal debtor and the creditor to which the surety gives the guarantee for making any change or alteration in the contract to be made or not to claim any right or benefit under Chapter VIII of the Act. In other words, in the surety-bond/guarantee-bond itself the surety can agree to waive his rights available to him under the various provisions contained in Chapter 8 of the act. Such waving of his right by the surety is permissible under sections 133 read with section 128 of the Act.

CO-EXTENSIVE LIABILITY OF GUARANTOR TO A CONTRACT

Sri M C Ponnappa vs State Bank Of Mysore on 26 August, 2014 - HIGH COURT OF KARNATAKA AT BANGALORE - WRIT PETITION No. 13399 OF 2012 - THE HON'BLE MR. JUSTICE ANAND BYRAREDDY **2014 (4) KCCR 3601** - The legal principle governing the scope and meaning of the 'co-extensive' liability of the Guarantor to a contract is succinctly restated in the aforesaid decision. The same may be summarized thus:

- (i) A creditor is not bound to exhaust his remedy against the principal debtor before suing the surety and that when a decree is obtained against a surety, it may be enforced in the same manner as a decree for any other debt. (See: Bank of Bihar Ltd. v. Damodar Prasad, AIR 1969 SC 297)
- (ii) The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. A guarantee is a collateral security, which would become useless if his rights against the surety are curtailed. (Bank of Bihar Ltd. v. Damodar Prasad, supra)
- (iii) The decree holder can execute the decree against the guarantor without proceeding against the principal borrower. The guarantor's liability is co-extensive with that of the principal borrower, unless it

is otherwise provided. (SBI v. Indexport Registered, AIR 1992 SC 1740)

(iv)The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. (Hukumchand Insurance Co. Ltd. v. Bank of Baroda, AIR 1977 Kant 204.)

Industrial Investment Bank of India Ltd. vs. Biswanath Jhunjhunwala (18.08.2009 - SC) : MANU/SC/1475/2009 - 2009 (9) SCC 478 - The legal position as crystallized by a series of cases of this Court is clear that the liability of the guarantor and principle debtors are co-extensive and not in alternative. - The liability of the surety is co-extensive with the principal debtor, unless it is otherwise provided by the contract.

Central Bank of India v. Vimla 2015 (7) SCC 337
We are of the opinion that the questions that need to be decided by us are regarding the liability of the guarantor under Section 128 of the Indian Contract Act, 1872. The legislature has succinctly stated that the liability of the guarantor is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. This Court has decided on this question, time and again, in line with the intent of the legislature. In Ram Kishun and Ors. v. State of U.P. and Ors., (2012) 11 SCC 511, this Court has held that “in view of the provisions of Section 128 of the

Contract Act, the liability of the guarantor/surety is co-extensive with that of the debtor.” The only exception to the nature of the liability of the guarantor is provided in the Section itself, which is only if it stated explicitly to be otherwise in the Contract.

Court has held in United Bank of India v. Bengal Behar Construction Company Ltd. and others, (1998) 8 SCC 653, that the Clauses in the letter of guarantee are binding on the guarantors as follows: “In view of the above, the question regarding confirmation of the decree against the guarantors now needs to be settled. we see no reason why the guarantors should not be made liable under the letters of guarantee, the terms whereof clearly stipulate that on the failure of the principal debtor to abide by the contract, they will be liable to pay the amount due from the principal debtor by the appellants. Clause 15 of the letter of guarantee, in terms states that any action settled or stated between the bank and the principal debtor or admitted by the principal debtor shall be accepted by the guarantors as conclusive evidence. In view of this stipulation in the letter of guarantee, once the decree on admission is passed against the principal debtor, the guarantors would become liable to satisfy the decree jointly and severally.”

EXCEPTION TO CO-EXISTENSIVE LIABILITY

In Pawan Kumar Jain v. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and Ors.

MANU/SC/0602/2004 : (2004) 6 SCC 758, a two-Judge Bench of this Court declared that no proceedings for recovery of the outstanding loan amount can be taken against a guarantor so long as the property of the borrower which is mortgaged, charged or otherwise encumbered is not first sold. Section 4(2)(b) of the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 was in the process interpreted to be giving protection against recovery proceedings not only to the borrower of the loan but to his guarantor as well. The conclusion drawn by this Court is summed up in the following passage: 8. In our view, the above-set-out provisions of the U.P. Act are very clear. Action against the guarantor cannot be taken until the property of the principal debtor is first sold off. As the Appellant has not sold the property of the principal debtor, the action against the Appellant cannot be sustained. We, therefore, set aside the recovery notice.

Archana T.A. vs. Travancore Devaswom Board and Ors.: MANU/KE/1843/2015 - ILR 2015 (4) Kerala

229 - In Sasikumar J. v. Branch Manager, Chittur Government Servants' Co-operative Society Ltd., Kollangode and Others MANU/KE/1957/2014 : 2014 (4) KHC 801 : AIR 2015 NOC 232 a learned Judge of this Court held that, Section 37 of the Kerala Co-operative Societies Act, 1969 states unequivocally

that, notwithstanding any law in force, if there is an agreement between the borrower and the creditor Society/Bank with respect to deduction of salary for satisfaction of debt, then the employer or the Disbursing Officer of the borrower shall be obliged to deduct the salary and pay the amounts demanded by the creditor Society/Bank on default being committed. In the case on hand, as evident from Ext. R4(a) bond the appellant is neither a co-borrower nor a surety in the loan availed by her late husband from the 4th respondent society. She has also not executed any agreement with the 4th respondent society, in terms of sub-section (1) of Section 37 of the Act, providing that the 5th respondent, who is the officer disbursing her salary shall be competent to deduct from the salary payable to her any specified amount and to pay the amount so deducted to the 4th respondent society in satisfaction of any liability of her late husband in the loan availed from the said society.In Ext. R-4 (b) letter obtained by the 4th respondent Society in a plain paper, the appellant had agreed to clear the balance amount outstanding in the loan availed by her late husband. Such a document can, by no stretch of imagination, be termed as an agreement in terms of sub-section (1) of Section 37 of the Act, empowering or entitling the 4th respondent society to proceed against the attachable portion of her salary. In the absence of any such agreement, the 5th respondent has no authority to deduct any amount from the

salary payable to the appellant on the request of the 4th respondent Society. Therefore, the direction of the 3rd respondent as contained in Ext.-P-2 communication addressed to the 5th respondent cannot be sustained in law. When Section 37 of the Act can be resorted to by the 4th respondent Society only if there is a specific agreement to that regard, the finding of the learned Single Judge that, the salary of the appellant can be proceeded against since she has owned up the liability in Ext. R-4(b) undertaking cannot be sustained.

ONE OF THE JOINT FD HOLDER CANNOT GIVE GUARANTEE OF FD WITHOUT CONSENT OF OTHER

Anumati vs Punjab National Bank 2004 (8) SCC 498, AIR 2005 SC 29 A fixed deposit in the joint names of two persons is nothing but a joint account which, as the name itself suggests, is repayable on the expiration of the agreed period. The fixed deposit receipt is merely a written acknowledgement by the Bank that it holds a certain sum to the use of its customers. The Bank is thus a debtor to the account holders in respect of the amount deposited a debt which is repayable by the bank to the account holders with interest on the expiry of an agreed period. An "either or survivor" clause in such an account means that the amount payable by the Bank on maturity of the fixed deposit may be paid to either of the account

holders by the Bank in order to obtain a valid discharge. In other words under a tripartite agreement between the joint account holders inter se and the Bank, the Bank may, on maturity, make payment only to either of them. This tripartite agreement cannot be bilaterally modified by one of the joint account holders for example by pledging the account with any third party including the Bank itself in its capacity of creditor, so that the amount becomes payable to such third party, without the consent of the joint account holder.

According to Sheldon and Fidler's Practice and Law of Banking , a Banker should not lend money to the parties to a joint account, either by means by an overdraft or in any other way, without obtaining from each of the parties an undertaking to be severally as well as jointly liable to pay the loan.

Thus in Tannan's Banking Law and Practice in India the legal position has been summarized thus: "On the view that the terms of operation of a joint account constitute a term of the contract of deposit, any variation or revocation of instructions in a joint account, whether the operation is by 'either or survivor' or 'former or survivor' can be effected only under the joint signatures of all persons entitled to operate the joint account. One of the joint account holders thus cannot unilaterally instruct the Bank not to honour cheques signed by the others, issue duplicate deposit receipt, premature repayment or loan against Fixed Deposit".

In *Hirschorn v. Evans* (Barclays Bank Ltd., Garnishees), 1938 (2) KB 801(L) a joint deposit account was opened by A and B (who were husband and wife) and the bank was authorized to accept the signature of either A or B or of the survivor as a sufficient discharge for the repayment of the moneys deposited. This debt was attached by a third party in execution of a decree against A, the husband. Pursuant to the garnishee summons, the Bank paid A's decretal debt to the decree holder. The Court of Appeal held that inasmuch as the debt which the bank owed was not a debt due to the husband alone, but to him jointly with his wife, it could not be attached to answer the judgment against the husband.

In our view, these decisions correctly set out the law. In the present case the contract in respect of the joint account was between the respondent bank and the husband and wife. The fixed deposit was not a debt due by the bank to Mam Chand alone which could be set off by the bank against any claim that the bank may have had against Mam Chand. Besides the right of Mam Chand was to receive the money deposited only after it matured, if he survived. Supposing Mam Chand had died before the fixed deposit matured, the only person entitled to get the money would be the appellant. This right of the appellant could not have been taken away without her consent. The decision cited by learned counsel on behalf of the respondents i.e. *Punjab National Bank V.*

Surendra Prasad Sinha 1993 (1) SCC 499 was not rendered in connection with a joint fixed deposit account in which only one of the account holders was a debtor. In that case, both the account holders stood guarantors to the principal debtor and had jointly executed the security bond and entrusted the fixed deposit receipt as security to adjust the outstanding debt from it at maturity.

ALL PLEAS OF GUARANTOR TO BE TAKEN IN TRIAL AND NOT THEREAFTER

State Bank Of India vs Indexport Registered And Ors 1992 AIR 1740, 1992 SCR (2)1031 The

guarantor in the present suit never took any plea to the effect that his liability is only contingent if remedies against the principle debtor fail to satisfy the dues of the decree-holder. If such a plea had been taken and the court trying the suit had considered the plea and gave any finding in favour of the guarantor, then it would have been a different position. But in the present case, on the face of the decree, which has become final, the court cannot construe it otherwise than its tenor. No. executing court can go beyond the decree. All such pleas as to the rights which the guarantor had, had to be taken during trial and not after the decree while execution is being levied. In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the

defendants including the guarantor. It is the right of the decree-holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract"

In State Bank of India v. Indexport Registered and Ors. MANU/SC/0328/1992 : (1992) 3 SCC 159

Court held that the decree-holder bank can execute the decree against the guarantor without proceeding against the principal borrower and then proceeded to observe: The execution of the money decree is not made dependent on first applying for execution of the mortgage decree. The choice is left entirely with the decree-holder. The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the [principal debtor].

WHEN WITH DEFAULT OF CREDITOR SUIT ABATES SURETY IS DISCHARGED

Syndicate Bank,... vs Pamidi Somaiah (Died) And Anr. 2001 (6) ALD 365, (AP), AIR 2002 AP 12, A

perusal of the above provisions clearly shows that the person, who gives guarantee to discharge the liability of a third person in case of his default, is called 'surety' and the person in respect of whose default the guarantee is given is called the 'principal Debtor'. The liability of the surety is co-extensive with that of the principal Debtor. Section 134 shows that the surety's liability stands discharged by any contract between the creditor and the principal Debtor by which the principal Debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal Debtor. Section 139 also contemplates the discharge of surety by the creditor's act or omission impairing surety's eventual remedy. As per Section 140, where a guaranteed debt has become due, or on default of the principal Debtor, the surety, upon payment, is invested with all the rights, which the creditor had against the principal Debtor. In the above provisions, it is clear that the rights and obligations on both the creditor and the surety are provided. In the present case it is a fact that though the creditor filed the suit both against the principal Debtor and the surety, the principal Debtor died during the pendency of the suit and because of the omission on the part of the creditor the suit stands abated against the principal Debtor. The effect of it is the creditor cannot proceed against the principal Debtor or his legal heirs and the debt stands discharged because of the omission to act on the part of the creditor. Now it is to be examined 'whether by

the said omission on the part of the creditor, which had resulted in the abatement of the suit against the principal Debtor and consequential discharge against the principal Debtor would result in discharge of the surety or not'. As already noticed, the surety is only a guarantor for the due to be discharged by the principal Debtor and in case of default committed by the principal Debtor, the surety has to make good the loss to the creditor. It is also not in dispute that the creditor has the right to proceed against the surety also, even though he can proceed against the principal Debtor.

Kurnool Chit Funds P. Ltd. vs. Pvt. Narsimaa and others (AIR 2008 AP 38) : "13. A surety is a person

who comes forward to pay the Suit No. 94925/16 amount in the event of the borrower failing to pay the amount, unless it is held by a competent Court through a decree that he is not liable to pay the amount due to the creditor and when he denies the liability it becomes difficult for the creditor to realize the amount. In the event of a decree in favour of the creditor against the principal borrower, the wings of the decree can also be extended against the sureties as their liability is co- extensive with the principal debtor. When once there is a decree, the creditor is at liberty to proceed either against the principal borrower or sureties provided that the remedy of the surety is available for recovery of the amount against the principal debtor after payment of the amount to the

creditor. But in the present case, the suit against the principal debtor is dismissed for default and the decision became final. Therefore, under law, there is no liability surviving against D1 for realization of the amount due to the creditor. When once the liability of the principal debtor is extinguished, the sureties liability gets automatically terminated. Therefore, without making the principal debtor liable for payment of the amount to the creditor, the sureties cannot be made liable for recovery of the amount."

Maharashtra State Electricity Board v. Official Liquidator, reported in AIR 1982 SC 1497 that dissolution of the principal-debtor would not release or discharge the sureties. The fact that the principal debtor had gone into liquidation would not have any effect on the Bank's liability as guarantor. Under section 128 of the Indian Contract Act the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. A surety is no doubt discharged under section 134 of the Indian Contract Act by any contract between the creditor and the principal debtor by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. But a discharge which the principal debtor may secure by operation of law in bankruptcy (or in liquidation

proceedings in the case of a company) does not absolve the surety of his liability.

EARNEST MONEY - ADVANCE MONEY - RIGHT TO TREAT IT AS GUARANTEE

In Shree Hanuman Cotton Mills Vs. Tata Air-Craft Ltd. MANU/SC/0086/1969 : (1969) 3 SCC 522, the Supreme Court laid down certain principles to determine as to when the amount paid as 'advance' be treated as 'earnest money' and the seller is entitled to forfeit the same. Para 21 of the judgment is reproduced hereunder:

"21. From a review of the decisions cited above, the following principles emerge regarding 'earnest':

- (1) It must be given at the moment at which the contract is concluded.
- (2) It represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract.
- (3) It is part of the purchase price when the transaction is carried out.
- (4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.
- (5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest."

Satish Batra Vs. Sudhir Rawal MANU/SC/ 0887/ 2012 : (2013) 1 SCC 345 has held that precision and clarity in clauses of contract to justify forfeiture is necessary and that in agreement for purchase of immovable property the forfeiture clause will not apply when the payment is made only towards part payment of consideration and not intended as earnest money.

In the matter of DDA Vs. Grihsthapana Coop. Group Housing Society Ltd. MANU/SC/0247/1995 : 1995 Supplementary (1) SCC 751, the Supreme Court, following privy council's decision in the matter of Chiranjit Singh Vs. Har Swarup MANU/PR/0083/1925 : AIR 1926 PC 1, held that for the question whether the respondents are entitled to forfeit the entire amount, it is to be seen that a specific covenant under the contract was that the respondents are entitled to forfeit the money paid under the contract. So when the contract fell through by the default committed by the appellant, as part of the contract, they are entitled to forfeit the entire amount.

In Videocon Properties Ltd. Vs. Bhalchandra Laboratories MANU/SC/1097/2003 : (2004) 3 SCC 711, the Supreme Court examined the nature and character of the earnest money and took a view that the words used in the agreement alone would not be determinative of the character of the "earnest money" but really the intention of the parties and surrounding circumstances. It held that the earnest money serves

two purposes of being part-payment of the purchase money and security for the performance of the contract by the party concerned.

In Satish Batra MANU/SC/0887/2012 : (2013) 1 SCC 345, the Supreme Court considered the issue and held thus in paragraph 15 and 16.

15. The law is, therefore, clear that to justify the forfeiture of advance money being part of "earnest money" the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance, by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get the double the amount, if it is so stipulated. It is also the law that part payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.

16. When we examine the clauses in the instant case, it is amply clear that the clause extracted hereinabove was included in the contract at the moment at which the contract was entered into. It represents the guarantee that the contract would be fulfilled. In other words, "earnest" is given to bind the contract, which is a part of the purchase price when the transaction is

carried out and it will be forfeited when the transaction falls through by reason of the default or failure of the purchaser. There is no other clause militates against the clauses extracted in the agreement dated 29.11.2011.

Narendrakumar Nakhat Vs. Nandi Hasbi Textile Mills Ltd. and Ors. reported in MANU/KA/0031/1997, ILR 1997 KAR 1

a Division Bench of the Court after analysing Section 74 of the Indian Contract Act and the forfeiture Clause in an Agreement of auction sale was pleased to observe that, where under the terms of the contract, the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which has already been paid to the party complaining of breach of contract, the undertaking is of the nature of penalty. The Court was further pleased to observe that the 'earnest money deposit' in the said case must be treated as liquidated damages and as per Clause 6 of the Agreement, that amount would be liable for forfeiture on account of any default by him.

ONGC Ltd. v. Saw Pipes Ltd., MANU/SC/0314/2003 : (2003) 5 SCC 705, it was held:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation."

Supreme Court in the case of Kailash Nath Associates v. Delhi Development Authority and Another MANU/SC/0019/2015 : (2015) 4 SCC 136

that there cannot be forfeiture under an agreement to sell unless loss is pleaded and proved to have been caused to the seller of the property on account of the breach of contract by the buyer. In the present case,

there are no pleadings or any evidence led as to how the appellant/defendant/seller/builder has suffered monetary loss of a specific amount of moneys on account of the respondent/plaintiff having breached the Agreement to Sell. Normally loss is caused to a seller if the value of the property goes down from the agreed price as stated in the agreement to sell to a lower price prevailing as on the date of performance of the agreement to sell. In the present case, no such evidence is led with respect to fall in the price of the property, much less by documentary evidence of the sale deeds of similar properties showing fall in the value of the property.

In Maula Bux v. Union of India (UOI), MANU/SC/0081/1969 : 1970 (1) SCR 928, it was held: "Forfeiture of earnest money under a contract for sale of property--movable or immovable--if the amount is reasonable, does not fall within Section 74. These cases are easily explained, for forfeiture of a reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

CHAPTER-4

DEBT RECOVERY AND NEGOTIABLE INSTRUMENTS

PROMISSORY NOTE AND PRESUMPTION REBUTABLE BY PROBABLE DEFENCE

Court in Bharat Barrel & Drum Manufacturing Co. v. Amin Chand Pyarelal, MANU/SC/0123/1999 :

(1999) 3 SCC 35 had occasion to consider, the presumption Under Section 118(a) of N.I. Act. The presumption would arise that it is supported by a consideration. Such a presumption is rebuttable and Defendant can prove the non-existence of a consideration by raising a probable defence. In paragraph No. 12 following has been laid down: "Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption Under Section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The Defendant can prove the non-existence of a consideration by raising a probable defence. If the Defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the Plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The

burden upon the Defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the Plaintiff is entitled under law to rely upon all the evidence led in the case including that of the Plaintiff as well. In case, where the Defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the Plaintiff would invariably be held entitled to the benefit of presumption arising Under Section 118(a) in his favour. The court may not insist upon the Defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated and even if led, is to be seen with a doubt. The bare denial of the passing of the consideration apparently does not appear to be any defence. Something which is probable has to be brought on record for getting the benefit of shifting the onus of proving to the Plaintiff. To disprove the presumption, the Defendant has to bring on record such facts and circumstances upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances of the case, shall act upon the plea that it did not exist....."

POWER OF ATTORNEY HOLDER CAPACITY TO FILE COMPLAINT

Bench of three Judges. By judgment dated 13th September, 2013 reported in 2013 (11) SCALE 360 - A.C. Narayanan vs. State of Maharashtra the said larger Bench framed the following questions:

(i) Whether a Power of Attorney holder can sign and file a complaint petition behalf of the complainant? Whether the eligibility criteria prescribed by Section 142(a) of NI Act would stand satisfied if the complaint petition itself is filed in the name of the payee or the holder in due course of the cheque?

(ii) Whether a Power of Attorney holder can be varied on oath under Section 200 of the Code?

(iii) Whether specific averments as to the knowledge of the Power of Attorney holder in the impugned transaction must be explicitly asserted in the complaint?

(iv) If the Power of Attorney holder fails to assert explicitly his knowledge in the complaint then can the Power of Attorney holder verify the complaint on oath on such presumption of knowledge?

(v) Whether the proceedings contemplated under Section 200 of the Code can be dispensed with in the light of Section 145 of the N.I. Act which was introduced by an amendment in the year 2002?

we clarify the position and answer the questions in the following manner:

(i) Filing of complaint petition under Section 138 of N.I Act through power of attorney is perfectly legal and competent.

(ii) The Power of Attorney holder can depose and verify on oath before the Court in order to prove the contents of the complaint. However, the power of attorney holder must have witnessed the transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transactions.

(iii) It is required by the complainant to make specific assertion as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

(iv) In the light of section 145 of N.I Act, it is open to the Magistrate to rely upon the verification in the form of affidavit filed by the complainant in support of the complaint under Section 138 of the N.I Act and the Magistrate is neither mandatorily obliged to call upon the complainant to remain present before the Court, nor to examine the complainant or his witness upon oath for taking the decision whether or not to issue process on the complaint under Section 138 of the N.I. Act.

(v) The functions under the general power of attorney cannot be delegated to another person without specific clause permitting the same in the power of attorney. Nevertheless, the general power of attorney itself can be cancelled and be given to another person.

An incidental question, namely, whether a person authorized by a company or other institution could sub- delegate power to another, to file a criminal complaint? It was answered thus : "25. The issue raised is in reference to validity of sub-delegation of functions of the power of attorney. We have already clarified to the extent that the attorney holder can sign and file a complaint on behalf of the complainant-payee. However, whether the power of attorney holder will have the power to further delegate the functions to another person will completely depend on the terms of the general power of attorney. As a result, the authority to sub- delegate the functions must be explicitly mentioned in the general power of attorney. Otherwise, the sub-delegation will be inconsistent with the general power of attorney and thereby will be invalid in law. Nevertheless, the general power of attorney itself can be cancelled and be given to another person."

Complaint presented for the offence punishable under the NI Act, it should be supported by an authorization or Power of Attorney as held by Court in the case of Director **Maruti Feeds and Farms Pvt. Ltd. v. Basanna Pattekar reported in ILR 2007 KAR 2135**, wherein it is hold: When a complainant deposing on behalf of the company - non production of resolution -authorizing the Director of the Company to establish that the Director has been authorized to depose for and on behalf of the Company is fatal to the complaint

and the complaint cannot be entertained in the absence of authorization or a power of attorney.

Om Shakti SC & ST and Minority Credit Co-op. Society Ltd. v. M Venkatesh, 2008(2) Kar.LJ 486,

President being an authorised officer of the Co-operative Society, can present a complaint on behalf of the society. Since the provisions of the Co-operative societies Act, clearly indicate that the President can exercise powers on behalf of the Society. The complaint is not accompanied with the bye-law of the Society to establish the said fact.

Siri Finance and Investment, Brahmavar vs. H. Ravindra Shetty: MANU/KA/1592/2019 - In the

trial Court, the partnership deed of the complainant firm is marked as Ex. P7. Clause 13(c) of the said partnership deed reads as below: 13. No partner is entitled to do following without the consent of the other partners. c) file a suit or proceeding on behalf of the firm and/or admit any liability in a suit or proceeding against the firm.... The word, 'suit' and 'proceeding' are not defined in the partnership deed though the word suit can be understood in its common parlance as a civil litigation initiated or instituted under the Code of Civil Procedure in a Court of law for its adjudication, but the expression proceeding being a generic word has to be given its meaning in comparison with the other terms used in the agreement and considering the nature of the

document. Hon'ble Apex Court in the case of Ram Chandra Aggarwal and another Vs. The State of Uttar Pradesh and another reported in MANU/SC/0088/1966 : AIR 1966 SC 1888, wherein the Hon'ble Apex Court was pleased to observe as below that "the expression "proceeding" is not a term of art, which has acquired a definite meaning. What its meaning is when it occurs in a particular statute or a provision of a statute will have to be ascertained by looking at the relevant statute. Looking to the context in which the word has been used in Section 24(1)(b) of the Code of Civil Procedure, it would appear to us to be something going on in a Court in relation to the adjudication of a dispute other than a suit or an appeal. Bearing in mind that the term "proceeding" indicates something in which, business is conducted according to a prescribed mode it would be only right to give it, as used in the aforesaid provision, a comprehensive meaning so as to include within it all matters coming up for judicial adjudication and not to confine it to a civil proceeding alone." In Mayadhar Mallik Vs. Smt. Laxmi Mallik and others reported in MANU/OR/0022/1999 : AIR 1999 ORISSA 81 the Orissa High Court was pleased to observe as "the word 'proceeding' is a general word "going forward". When used in connection with any legal matter, it would generally mean, 'prescribed mode of action for carrying into effect a legal right'. Thus, to start a proceeding against some one would mean, 'to start a legal action against him'. In its

ordinary acceptation, or general sense, except as qualified by the subject to which it is applied. "proceeding" means the form and manner of conducting judicial business before a Court or judicial officer, the form in which actions are to be brought and defended; the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing them. The word 'proceedings' has different shades of meaning and can be given a narrow or wide import depending upon the nature and scope of the enactments in which it is used and in particular context of the language of the enactment in which it appears." For these reasons though a criminal law can be set into motion by any one, but, when there is a specific bar like the one under Clause 13(c), the partner even though he is a Managing Partner could not have instituted the complaint without the consent of the other partners as mandated under the said Clause 13(c) of the partnership deed. Thus, the finding of the trial court that the complaint filed by the Managing Partner despite a bar under Clause 13(c) of Ex. P7 was not maintainable, cannot be found fault with.

FACTUAL BASIS FOR RAISING PRESUMPTION

G. Premdas v. Venkataraman MANU/KA/0897 /2000 : 2001 (1) KCCR 437 wherein Court has held that presumption is available to the holder of the

cheque but, unless the complainant discharges the basic requirement of proof of commission of offence through cogent evidence, such presumption cannot be drawn.

Bharat Barrel & Drum Manufacturing Company v. Amin Chand Payrelal MANU/SC/0123/1999 to disprove the presumption the defendant has to bring on record such facts and circumstances, upon consideration of which the court may either believe that the consideration did not exist or its non-existence was so probable that a prudent man would, under the circumstances, shall act upon the plea that it did not exist.

Prasanna & Company, Bangalore v. Prasanna Kumar and Anr. MANU/KA/0350/2000 to contend that the condition precedent for passing a decree is, unless the court is satisfied that the money lender held a valid money lending license, court cannot pass a decree in favour of the money lender.

K.N. Beena v. Muniyappan and Anr. MANU/SC/0661/2001 wherein it is held thus in **para 7**: The High Court appears to have proceeded on the basis that the denials/averments in respondent's reply to the legal notice were sufficient to shift the burden of proof on to the appellant complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The accused

had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The respondent-accused not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the magistrate was correct. The High Court erroneously set aside that conviction.

Shaik Hussan and Sons v. M.G. Kannaiah and Anr. **MANU/SC/0037/1981** the Apex Court referring to Section 313, Cr.PC has held that the statement of the accused by itself... And the language used cannot provide the necessary factual basis or fact situation which must exist before presumption can be raised.

Ratakonda Raghu Naidu v. Kolla Sivaram Prasad and Anr. **2004 (1) DCR 91** as per Section 2(7) of the Money Lenders Act Money Lender is only those persons whose regular business is to advance monies and not those who advances money casually and also to contend that in the absence of any evidence to show that the respondent advanced money regularly as a money lender, dismissal of the complaint was held to be erroneous.

V. Satyanarayana v. Sandeep Enterprises **2005 (1) DCR 203**, it is held that dis-honour of a cheque issued by a money lender is not a bar for him to proceed to recover the amount and to file a complaint under

Section 138 of the Negotiable Instruments Act and also to contend that it is not sufficient to attract the provisions contained in Karnataka Money Lenders Act.

Hiten P. Dalal v. Bratindranath Baneerjee
MANU/SC/0359/2001 the Apex Court has held that the presumption has to be raised as per Section 139 of the Negotiable Instruments Act that the cheque was drawn for discharge of liability of the drawer and that mere plausible explanation is not sufficient by the accused and the proof of explanation is very much necessary.

K.N. Beena v. Muniyappan and Anr.
MANU/SC/0661/2001 the burden of proving the cheque was not issued for any debt or liability is on the accused and that the accused has to prove in trial by leading cogent evidence that there was no debt or liability.

S. Parameshwarappa and Ors. vs. S. Choodappa:
2006 (4) KCCR 2685 MANU/KA/8355/2006 - Even in respect of the contention taken by the petitioners that it is a monetary transaction by way of money lending by the complainant and that he did not have the money lending license, the answer would be - this Court has already held in so far as a transaction of this nature, the question of the complainant having a money lending license with him does not arise. May be true that this Court in respect of the money lending

as a matter of obligation on the part of the plaintiff in a suit for recovery of money, would insist, as a condition precedent, to have a money lending license. This is not a suit for recovery of money rather, the complainant is exercising the special powers provided under the Negotiable Instruments Act for non-payment and dis-honour of cheque which is more in a quasi civil & criminal in nature.

Hon'ble Apex Court in the case of Basalingappa Vs. Mudibasappa reported in MANU/SC/0502/2019 : AIR 2019 SC 1983 has held that when once the execution of cheque is admitted, Section 139 of the Act mandates the presumption that the cheque was issued for discharge of a debt or any liability. The presumption under Section 139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. It has been held by the Apex Court that standard of proof for rebutting the presumption is that of preponderance of probabilities. It has also been held that to rebut the presumption, it is open for the accused to rely on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

Hon'ble Apex Court in the case of Bir Singh v. Mukesh Kumar reported in MANU/SC/0154/2019 : (2019) 4 SCC 197, wherein at paragraphs 18, 20 and 24 reads as under:

"18. In passing the impugned judgment and order dated 21-11-2017 [Mukesh Kumar v. Bir Singh, 2017 SCC OnLine P & H 5352], the High Court misconstrued Section 139 of the Negotiable Instruments Act, which mandates that unless the contrary is proved, it is to be presumed that the holder of a cheque received the cheque of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability. Needless to mention that the presumption contemplated under Section 139 of the Negotiable Instruments Act, is a rebuttable presumption. However, the onus of proving that the cheque was not in discharge of any debt or other liability is on the accused drawer of the cheque.....

20. Section 139 introduces an exception to the general rule as to the burden of proof and shifts the onus on the accused. The presumption under Section 139 of the Negotiable Instruments Act is a presumption of law, as distinguished from presumption of facts. Presumptions are rules of evidence and do not conflict with the presumption of innocence, which requires the prosecution to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law and presumptions of fact unless the accused adduces

evidence showing the reasonable possibility of the nonexistence of the presumed fact as held in Hiten P. Dalai [Hiten P. Dalai v. Bratindranath Banerjee, MANU/SC/0359/2001 : (2001) 6 SCC 16 : 2001 SCC (Cri) 960].

24. In K.N. Beena v. Muniyappan [K.N. Beena v. Muniyappan, MANU/SC/0661/2001 : (2001) 8 SCC 458 : 2002 SCC (Cri) 14], this Court held that in view of the provisions of Section 139 of the Negotiable Instruments Act read with Section 118 thereof the Court had to presume that the cheque had been issued for discharging a debt or liability. The said presumption was rebuttable and could be rebutted by the accused by proving the contrary. But mere denial or rebuttal by the accused was not enough. The accused had to prove by cogent evidence that there was no debt or liability. This Court clearly held that the High Court had erroneously set aside the conviction, by proceeding on the basis that denials/averments in the reply of the accused were sufficient to shift the burden of proof on the complainant to prove that the cheque had been issued for discharge of a debt or a liability. This was an entirely erroneous approach. The accused had to prove in the trial by leading cogent evidence that there was no debt or liability."

Explaining the above case of Bir Singh by Karnataka High court in K. Uma vs. S.C. Bhadrachala : MANU/KA/8688/2019

13. If the cheque is otherwise valid, the penal provisions of Section 138 would be attracted. If a signed blank cheque is voluntarily presented to a payee, towards some payment, the payee may fill up the amount and other particulars. This in itself would not invalidate the cheque. The onus would still be on the accused to prove that the cheque was not in discharge of a debt or liability by adducing the evidence. In paragraph 39 it has been observed that it was not the case of the respondent-accused that he either signed the cheque or parted with it under any threat or coercion. Nor was it the case of the respondent-accused that the unfilled signed cheque had been stolen. However, in the present case, though the allegation has been made by the accused that the cheque was stolen, no complaint has been filed by the accused. Even after receipt of the legal notice, which was got issued by the complainant, the accused has not taken any steps to file a complaint in this regard.

14. Under these circumstances, this Court is of the considered opinion that legal presumption which arises under Section 139 of the Negotiable Instruments Act in the absence of evidence to exercise undue influence or coercion, entitled the complainant the benefit of the presumption. Further as held by the Apex Court, in the absence of any finding that the cheque in question was not signed by the accused, and in the absence of any evidence with regard to the circumstances in which a blank signed cheque had been given to the complainant, it should be reasonably

presumed that it was filled in by the complainant being the payee and the accused is still liable to make good the amount drawn in the cheque. As held by the Hon'ble Apex Court, it is irrelevant that the amount and the name has not been filled up by the accused. It may be in the hand writing of the complainant, however even under those circumstances, it has been held by the Apex Court that the drawer of the cheque is liable to honour the said cheque.

Rohitbhai Jivanlal Patel v. State of Gujarat and Another MANU/SC/0393/2019 : AIR 2019 SC 1876 Court held as under:

18. So far the question of existence of basic ingredients for drawing of presumption Under Sections 118 and 139 the NI Act is concerned, apparent it is that the Accused-Appellant could not deny his signature on the cheques in question that had been drawn in favour of the complainant on a bank account maintained by the Accused for a sum of Rs. 3 lakhs each. The said cheques were presented to the Bank concerned within the period of their validity and were returned unpaid for the reason of either the balance being insufficient or the account being closed. All the basic ingredients of Section 138 as also of Sections 118 and 139 are apparent on the face of the record. The Trial Court had also consciously taken note of these facts and had drawn the requisite presumption. Therefore, it is required to be presumed that the cheques in question were drawn for

consideration and the holder of the cheques i.e., the complainant received the same in discharge of an existing debt. The onus, therefore, shifts on the Accused-Appellant to establish a probable defence so as to rebut such a presumption.".....

20. On the aspects relating to preponderance of probabilities, the Accused has to bring on record such facts and such circumstances which may lead the Court to conclude either that the consideration did not exist or that its nonexistence was so probable that a prudent man would, under the circumstances of the case, act upon the plea that the consideration did not exist. This Court has, time and again, emphasized that though there may not be sufficient negative evidence which could be brought on record by the Accused to discharge his burden, yet mere denial would not fulfil the requirements of rebuttal as envisaged Under Section 118 and 139 of the NI Act.....

32. The result of discussion in the foregoing paragraphs is that the major considerations on which the Trial Court chose to proceed clearly show its fundamental error of approach where, even after drawing the presumption, it had proceeded as if the complainant was to prove his case beyond reasonable doubt. Such being the fundamental flaw on the part of the Trial Court, the High Court cannot be said to have acted illegally or having exceeded its jurisdiction in reversing the judgment of acquittal. As noticed hereinabove, in the present matter, the High Court has conscientiously and carefully taken into

consideration the views of the Trial Court and after examining the evidence on record as a whole, found that the findings of the Trial Court are vitiated by perversity. Hence, interference by the High Court was inevitable; rather had to be made for just and proper decision of the matter.

M.S. Narayana Menon v. State of Kerala
MANU/SC/2881/2006 : (2006) 6 SCC 39 that

evidence adduced by the complainant can be relied upon to rebut the presumption of consideration. "If for the purpose of a civil litigation, the defendant may not adduce any evidence to discharge the initial burden placed on him, a 'fortiori' even an accused need not enter into the witness box and examine other witnesses in support of his defence." "For rebutting such presumption what is needed is to raise a probable defence. Even for the said purpose the evidence adduced on behalf of the complainant could be relied upon." "The standard of proof evidently is of preponderance of probabilities. Inference of preponderance can be drawn not only from the materials on records but also by reference to the circumstances upon which he relies."

"29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act (the interpretation clause)...

30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.....

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.

41...Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

M.S. Narayana Menon and K. Prakashan v. P.K. Surenderan MANU/SC/8009/2007 : (2008) 1 SCC

258 that if two views are possible, the appellate court shall not reverse a judgment of acquittal only because another view is possible to be taken.

John K. Abraham v. Simon C. Abraham
MANU/SC/1266/2013 : (2014) 2 SCC 236 that mere fact that the statutory notice was not replied cannot prejudice to the case of the Respondent.

Supreme Court in Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm
(MANU/SC/2555/2008 : AIR 2008 SC 2898), wherein it is observed : "It is also settled position that the initial burden in this regard lies on the defendant to prove the non existence of consideration by bringing on record such facts and circumstances which would lead the court to believe the non existence of the consideration either by direct evidence or by preponderance of probabilities showing that the existence of consideration was improbable, doubtful or illegal.....".

M/s. Kumar Exports Vs. M/s. Sharma Carpets,
MANU/SC/8414/2008 : AIR 2009 SC 1518 in para-11 has observed as under:

"11. The use of the phrase "until the contrary is proved" in Section 118 of the Act and use of the words "unless the contrary is proved" in Section 139 of the Act read with definitions of "may presume" and "shall presume" as given in Section 4 of the Evidence Act,

makes it at once clear that presumptions to be raised under both the provisions are rebuttable. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. The accused in a trial under Section 138 of the Act has two options. He can either show that consideration and debt did not exist or that under the particular circumstances of the case the non-existence of consideration and debt is so probable that a prudent man ought to suppose that no consideration and debt existed. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the note in question was not supported by consideration and that there was no debt or liability to be discharged by him. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of the consideration and existence of debt, apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant.

To disprove the presumptions, the accused should bring on record such facts and circumstances, upon consideration of which, the court may either believe that the consideration and debt did not exist or their non-existence was so probable that a prudent man would under the circumstances of the case, act upon the plea that they did not exist. Apart from adducing direct evidence to prove that the note in question was not supported by consideration or that he had not incurred any debt or liability, the accused may also rely upon circumstantial evidence and if the circumstances so relied upon are compelling, the burden may likewise shift again on to the complainant. The accused may also rely upon presumptions of fact, for instance, those mentioned in Section 114 of the Evidence Act to rebut the presumptions arising under Sections 118 and 139 of the Act. The accused has also an option to prove the non-existence of consideration and debt or liability either by letting in evidence or in some clear and exceptional cases, from the case set out by the complainant, that is, the averments in the complaint, the case set out in the statutory notice and evidence adduced by the complainant during the trial. Once such rebuttal evidence is adduced and accepted by the court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the complainant and, thereafter, the presumptions under Sections 118 and

139 of the Act will not again come to the complainant's rescue."

K. Subramani -vs- K. Damodara Naidu, reported in MANU/SC/1031/2014 : 2015 AIR SCW 64, with respect to a case falling under Section 138 of N.I. Act, the Hon'ble Apex Court was pleased to observe that the finding by the trial Court on consideration of entire oral and documentary evidence that complainant had no source of income to lend a sum of ₹ 14 lakhs to the accused and he failing to prove that there was legally recoverable debt payable by the accused to him, which resulted in acquittal of the accused, was proper.

Supreme Court in Vijay v. Laxman and another (2013 (3) SC 86). The allegation of the complainant in that case was the liability of the accused which arose from a loan transaction. But the former did not produce many materials to prove the transaction; he did not even mention in the complaint the date on which the loan was advanced. The Supreme Court observed: "The High Court has rightly accepted the version given by the respondent-accused herein. We say so for reasons more than one. In the first place the story of the complainant that he advanced a loan to the respondent-accused is unsupported by any material leave alone any documentary evidence that any such loan transaction had ever taken place. So much so, the complaint does not even indicate the date on which the loan was demanded and advanced.

It is blissfully silent about these aspects thereby making the entire story suspect. We are not unmindful of the fact that there is a presumption that the issue of a cheque is for consideration. Sections 118 and 139 of the Negotiable Instruments Act make that abundantly clear. That presumption is, however, rebuttable in nature. What is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case. It is trite that the courts can take into consideration the circumstances appearing in the evidence to determine whether the presumptions should be held to be sufficiently rebutted. The legal position regarding the standard of proof required for rebutting a presumption is fairly well settled by a long line of decisions of this Court." The court further observed: "..... the absence of any details of the date on which the loan was advanced as also the absence of any documentary or other evidence to show that any such loan transaction had indeed taken place between the parties is a significant circumstance."

In Sharada Finance Corporation v. L. Laxman Goud
MANU/AP/1136/2003 : 2004 (1) ALD 596 Court held that whenever a cheque was issued towards

partial discharge of the loan and when it was dishonoured after admitting the borrowal of the amount from the complainant, his plea that he gave a blank cheque duly signed in favour of the complainant does not amount to rebutting the presumption with regard to the existence of subsisting liability.

In B.V. Rangam v. B. Govinda Reddy MANU/AP/0250/2004, Court held that in view of the presumption under Section 138 of the Act, the burden lies on the accused to prove want of subsisting liability. When the complainant discharged his initial burden of proving that the cheque was issued towards subsisting liability and when the accused failed to rebut the presumption by adducing any evidence, the acquittal given by the trial Court on the ground that the complainant failed to prove that the dishonoured cheque was issued for a subsisting debt, cannot be sustained.

INCOME TAX - OFFENCE - MONEY LENDING - PRESUMPTION

Dhananjay vs. Revana Siddayya : MANU/KA/2270/2017

27. So far as the provision under the Income Tax Act, section 269SS is to the effect that, "no person shall take or accept from any other person (herein referred to as the depositor), any loan or deposit or any

specified sum, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account, if, - (a) the amount of such loan or deposit or specified sum or the aggregate amount of such loan, deposit and specified sum; or (b) on the date of taking or accepting such loan or deposit or specified sum, any loan or deposit or specified sum taken or accepted earlier by such person from the depositor is remaining unpaid (whether repayment has fallen due or not), the amount or the aggregate amount remaining unpaid; or (c) the amount or the aggregate amount referred to in clause (a) together with the amount or the aggregate amount referred to in clause (b), is twenty thousand rupees or more".

28. So looking to this provision also, as it is rightly submitted by the learned counsel for the respondent-complainant that according to this provision a duty is cast on the part of the accused person herein in this case that even if the complainant come forward to give such a huge amount by way of cash, he could have insisted to give the amount by way of account payee cheque or the bank draft, which was not done in this case. Therefore the accused person only on this basis cannot complain against the complainant that he violated the provisions of the Income Tax Act, more particularly section 269SS of the said provision. Apart from that, even if it is assumed that the complainant advanced such a huge amount in cash without getting any other document or he violated some of the

provisions of the Income Tax Act, it is also for the Income Tax Department to initiate action against the complainant. So only on that basis the entire material placed by the complainant both by way of oral and documentary evidence cannot be thrown out by the Court of law.

29. As per Section 3 of the Indian Evidence Act, the principle for appreciation of the evidence placed on record, the Court has to see the entire material. The cumulative effect is to be appreciated and not in isolation by here and there. Therefore the contention of the learned counsel appearing for the petitioner-accused that the documents were not obtained, it was a cash transaction, it is in violation of some of the provisions of the Income Tax Act and on that basis the case of the complainant is to be disbelieved cannot be accepted by this Court.

In the case of Sanjay Mishra vs. Kanisha Kapoor MANU/MH/1078/2009 : 2009(5) Bom. C.R. 464 It is held that merely because the amount advanced is not shown in the Income Tax Returns, in every case, one cannot jump to say that presumption under Section 139 of the Act stands rebutted.

Hon'ble Supreme Court in the case of Krishna Janardhan Bhat Vs. Dattatraya G. Hegde MANU/SC/0503/2008 : AIR 2008 SC 1325; (2008) 5 KCCR 2988 that as per Section 271-D of the Income

Tax Act, if a person takes or accepts any loan or deposit in contravention of provisions of Section 269-SS, he shall be liable to pay, by way of penalty, a sum equal to an amount of loan or deposit so taken or accepted. Thus, only on that basis it cannot be said that the presumption in favour of the appellant has been rebutted.

K. Damodara Naidu and Ors. vs. K. Subramani and Ors. : MANU/KA/3890/2013 ".....Be that as it

may, as could be seen from the language of Section 269, it refers to any person receiving any advance taken by way of loan of more than Rs. 20,000/-. It refers to the recipient of money and not the lender. Section 271 also makes it clear by referring to the person who receives money. There is no reference to the lender of money though by implication it could be held that when a cheque has to be issued, it is by the lender only. But the penal clause is only to the recipient and not to the lender. However, noticing that provision, the apex court held records of the transaction as enumerated in Section 269 would have been the reassurance which the complainant in that case had not produced."

CIT vs. Sree Krishna Promoters & Builders: MANU/KA/2346/2011 - Violation of section 269SS Transactions between sister concern--The assessee-firm and the lender firm M were sister concerns. There were two common partners at the relevant period in

both the firms. M was a common partner in both the firms and was managing the affairs of both the firms. The case of the assessee was that they took the money from the sister concern to make urgent payment. There was no intention to avoid taxes. Both the firms were regularly assessed to income-tax. It was argued that when it is the case of providing temporary accommodation to one sister concern to another sister concern it does not amount to transaction of loan or deposit and therefore, it is outside the purview of section 269SS of the Act. The assessing authority did not accept the said contention and found that there is violation of such provision and imposed penalty under section 271D. The Tribunal relying on various judgments set aside the penalty imposed. High Court held that, "It is clear that the deposits were received by one sister concern from another concern to meet the exigencies of the situation. It was not the case of borrowing of the loan or receipt of the deposit, as understood in taxation law. In fact only on five occasions the amount received was above Rs. 20,000, otherwise it was less than Rs. 20,000. Section 273B provides that the imposition of penalty is not automatic. If there is a reasonable cause then no penalty shall be imposed. It is in this circumstances in view of law the Tribunal rightly took the view that the cause shown by the assessee constitutes reasonable cause and therefore the penalty under section 271D was not attracted."

**Shiva Murthy vs. Amruthraj: 2008 (4) KCCR 2477
MANU/KA/0332/2008**

In the above reported decision, the Hon'ble Supreme Court (Krishna Janardhan Bhat Vs. Dattatraya G. Hegde MANU/SC/0503/2008 : AIR 2008 SC 1325; (2008) 5 KCCR 2988) considering various circumstances such as the complainants inability to show his source of income so as to enable him to advance a huge loan; non-production of book of accounts; absence of proof to show that the complainant got so much money from the Bank; absence of any written document evidencing lending of money; absence of any witness to the transaction; non compliance of provisions of Section 269SS of Income Tax Act which directs that any advance taken by way of any loan of more than Rs. 20,000/- should be made only by way of an Account Payee cheque; has set aside the conviction recorded against the accused therein. Before concluding the matter, the Hon'ble Supreme Court has also noticed the difficulty of proving a negative. The relevant observations are found in paragraphs 44 and 45 of the judgment which read thus;The courts must be on guard to see that merely on the application of presumption as contemplated under Section 139 of the Negotiable Instruments Act, the same may not lead to injustice or mistaken conviction. It is for the aforementioned reasons that we have taken into consideration the decisions operating in the field where the difficulty of proving a negative has been emphasised. It is not suggested that a negative can

never be proved but there are cases where such difficulties are faced by the accused e.g. honest and reasonable mistake of fact. In a recent article 'The presumption of Innocence and Reverse Burdens; a Balancing Duty published in MANU/MH/1017/2006 it has been stated: In determining whether a reverse burden is compatible with the presumption of innocence regard should also be had to the pragmatics of proof. How difficult would it be for the prosecution to prove guilt without the reverse burden? How easily could an innocent defendant discharge the reverse burden? But courts will not allow these pragmatic considerations to override the legitimate rights of the defendant. Pragmatism will have greater sway where the reverse burden would not pose the risk of great injustice-whether the offence is not too serious or the reverse burden only concerns a matter incidental to guilt. And greater weight will be given to prosecutorial efficiency in the regulatory environment.

45. We are not oblivious of the fact that the said provision has been inserted to regulate the growing business, trade, commerce and industrial activities of the country and the strict liability to promote greater vigilance in financial matters and to safeguard the faith of the creditor in the drawer of the cheque which is essential to the economic life of a developing country like India. This, however, shall not mean that the courts shall put a blind eye to the ground realities. Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn

should be held to have rebutted. Other important principles of legal jurisprudence, namely, presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should delicately balanced. Such balancing acts, indisputably would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same.

CHEQUE BOUNCE CASE AND MONEY LENDING LICENCE DEFENCE

Naveen Chandra vs. S. Ramesh:
MANU/KA/1945/2018 - "13. It is well known concept that where there is right, remedy is there ubi jus ibi remedium. When right is established or identified it carries the remedy which is the means of enforcement otherwise right has no value. On the other hand, in commercial transaction, certain rights loses their efficacy and enforceability because of the happening of certain events. For example, in a money transaction right to recover a debt by the lender is also a duty to repay of the borrower. However, when a period of three years is completed, right to recover debt gets expired and it would no more remain to be legally enforceable right. However, under Section 25(b) of the Indian Contract Act, 1872, it can be validated and terms to pay time barred debts is an exception to the Rule of consideration.

14. But when there is no acknowledgement of debt becomes time barred and not enforceable. In the same way, for a person who lends money and carries on the business of money lending, he is termed to be a money lender and it is mandatory on his part to possess a valid money lending licence issued by the competent authority i.e. the Assistant Registrar of Money Lenders.

15. This may not be applicable for an isolated transaction of lending or friendly borrowing which are totally not connected to money lending.

16. Where it is regular money lending requires valid licence. It is in this segment, the complainant is slated on loosing platform as he has admitted himself to be a regular money lender in positive terms during cross examination dated 26.2.2009 which is in Kannada version and he states that he was doing money lending transaction and he had money because of this money lending transaction and he is doing money lending alone and he also has obtained money lending licence and has produced the same before the Court. However, he has not shown the payment of money in the Income Tax returns filed under the Income Tax Act.

17.On perusal of the documents filed by the complainant clearly goes to show that he has not produced money lending licence issued by the competent authority But he did not possess money lending licence. Thus, by virtue of Section 11 of the Money Lenders Act, I hold that debt is not

recoverable and in view of non establishing of legally recoverable debt, the proceeding under Section 138 of Negotiable Instrument Act losses its efficacy and validity."

SHALL PRESUME IS NOT MEANT CONCLUSIVE PROOF

Court in Union of India (UOI) v. Pramod Gupta (D) by L.Rs. and Ors. MANU/SC/0549/2005 : AIR 2005 SC 3708 in the following terms: ...It is true that the legislature used two different phraseologies "shall be presumed" and "may be presumed" in Section 42 of the Punjab Land Revenue Act and furthermore although provided for the mode and manner of rebuttal of such presumption as regards the right to mines and minerals said to be vested in the Government vis-à-vis the absence thereof in relation to the lands presumed to be retained by the landowners but the same would not mean that the words "shall presume" would be conclusive. The meaning of the expressions "may presume" and "shall presume" have been explained in Section 4 of the Evidence Act, 1872, from a perusal whereof it would be evident that whenever it is directed that the court shall presume a fact it shall regard such fact as proved unless disproved. In terms of the said provision, thus,

the expression "shall presume" cannot be held to be synonymous with "conclusive proof."

PUNISHMENT IN CHEQUE BOUNCE CASES

In Vijayan v. Baby (MANU/SC/1245/2011 : AIR 2012 SC 528), the Apex Court has held as follows:

"The Courts should, unless there are special circumstances, in all cases of conviction, uniformly exercise the power to levy fine upto twice the cheque amount (keeping in view the cheque amount and the simple interest thereon at 9% per annum as the reasonable quantum of loss) and direct payment of such amount as compensation. Direction to pay compensation by way of restitution in regard to the loss on account of dishonour of the cheque should be practical and realistic, which would mean not only the payment of the cheque amount but interest thereon at a reasonable rate."

STAMP DUTY REQUIREMENTS

Gujjala Hanumanthappa and Ors. vs. S. Bala Rangaiah: MANU/KA/0068/1987 - ILR 1987 KAR 1201.

In this case the pronote has been written on an impressed stamp paper of requisite value. Therefore, both the courts below were justified in holding that the pronote had been duly stamped.

Section 35 of the Stamp Act reads, 'No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped: Provided that-(a) any such instrument not being an instrument chargeable with a duty not exceeding ten naye paise only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument, insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion.' Therefore S. 35 of the Stamp Act makes it clear that if a pronote is not executed on a duly stamped paper then it cannot be admitted in evidence at all, though the party might be willing to pay the duty and penalty.

Art. 49 of the Stamp Act which reads, '(a) when payable on demand- (i) when the amount or value does not exceed Rs. 250/-; Ten naya paise, (ii) when the amount or value exceeds Rs. 250 but does not exceed Rs. 1000; Fifteen naye paise, and (iii) in any other case; Twenty-five naye paise.' Art. 49 only prescribes the duty to be paid. S. 10 of the Stamp Act reads, '(1) Except as otherwise expressly provided in this Act, all

duties with which any instruments are chargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps- (a) according to the provisions herein contained; or (b) when no such provision is applicable thereto-as the State Government may by rule direct. 'Section 10 also deals with the description of the stamps to be used. S. 11 of the Stamp Act reads as:

"11. The following instruments may be stamped with adhesive stamps, namely: -

- (a) instruments chargeable with a duty not exceeding ten naye paise, except parts of bills of exchange payable otherwise than on demand and drawn in sets;
- (b) bills of exchange, and promissory notes drawn or made out of India;
- (c) entry as an advocate, vakil or attorney on the roll of a High Court;
- (d) notarial acts; and
- (e) transfers by endorsement of shares in any incorporated company or other body corporate."

Therefore S. 11 only enables the execution of some documents with adhesive stamps. Perhaps this section was incorporated with a view to see that when stamps of smaller denominations could be used, it may not be necessary to use an impressed stamp. But, there is nothing in S. 11 to restrain the party from using impressed stamps though adhesive stamps might be used. Section 12 only speaks as to how adhesive stamps should be cancelled by parties. Section 13 speaks as to how the impressed stamps

should be written. Section 14 speaks that only one instrument shall be written on one stamped paper and that no second instrument chargeable with duty shall be written on the same. Section 15 reads that every instrument written in contravention of Ss. 13 and 14 shall be deemed to be unstamped. Section 15 can be read with advantage. It does not say that any instrument written in contravention of S. 11 shall be deemed to be unstamped. Section 11 says that adhesive stamps may be used on the pronote. Therefore, it is a clear indication to show that promissory notes, though written on an impressed paper, will have to be taken in law as duly stamped. Sri Savanur then drew my attention to R. 5 of Stamp Rules which reads, 'a promissory note or bill of exchange, shall, except as provided by S. 11 or by Rr.13 and 18, be written on paper on which a stamp of the proper value, with or without the word "Hindi" has been engraved or embossed.' There is nothing in R. 5 to indicate that promissory note should be executed only by using adhesive stamp. Then he referred me to R. 13 of Stamp Rules which reads, "Use of adhesive stamps on certain instruments - The following instruments may be stamped with adhesive stamps, namely: -(f) Instruments chargeable with stamp duty under Arts. 19, 36, 37, 49(a)(ii) and (iii) and 52 of Schedule I" Even R. 13 only enables a party to use adhesive stamps. But, it does not prohibit the use of impressed stamps.

Mohanlal Kanailal v. Keshrimull Chordiya
AIR 1914 Mad 358. It was a case of a pronote written on one impressed paper to which another impressed paper containing no writing was annexed. Therefore, the Madras High Court held that as the other annexed paper had not been cancelled, as required by the Stamp Act, the pronote was not duly stamped.

Chhabildas Mangaldass, v. Luhar Kohan Arja, MANU/GJ/0047/1967 : AIR1967Guj7 . It was a case where the pronote was not executed either on an impressed paper or by using the adhesive stamp. Therefore, the Gujarat Court said that such document was inadmissible in evidence.

P. Moorthy v. A. R. Kothandaraman, MANU/TN/ 0253/1978 : AIR1978Mad412 . It was also a case where a pronote was found written on an impressed stamp paper of the value of Rs. 1-50/-. The Madras High Court after referring to the various provisions of the Stamp Act, Stamp Rules and the Tamil Nadu Rules held that a promissory note could be stamped with adhesive stamps or could be engrossed on an impressed stamp paper of proper value. The Madras High Court held that the word 'may' did not mean that adhesive stamps alone should be used. The Madras High Court referred to a decision reported in *Kalwan Singh v. Bhanwarlal* ILR (1965) Raj 231 which reads as, 'the rule is merely a permissive one, permitting the use of an adhesive stamp on promissory notes payable on demand when the amount or value exceeds Rs. 250/-. The rule does

not lay down that such promissory note shall be stamped with adhesive stamp of the requisite value. The result is that promissory note exceeding Rs. 250/- in value can be written on a paper having an impressed stamp or it can be stamped with adhesive stamps of the requisite value.'

Gurunanak Medical and Surgical Agency vs. Sitaram Shivhare: MANU /MP / 0165/ 2011 - AIR 2011 MP 115(FB). Full bench of Madhya Pradesh High Court.

The provisions of Indian Stamp act 1899: -

The Hon'ble Supreme Court in the case of Thiruvengadam Pillai v. Navaneethammal and Anr. reported in MANU/SC/0942/2008 : (2008) 4 SCC 530 has held that the Indian Stamp Act is a fiscal enactment and it is intended, to secure 'revenue' for the State. **Section 2(26) of the Indian Stamp Act, 1899** (hereinafter referred to 'the Act of 1899') defines "Stamp", which reads as under:

(26) "Stamp" means any mark, seal or endorsement by any agency or person duly authorised by the State Government, and includes an adhesive or impressed stamp, for the purpose of duty chargeable under this Act.

Similarly **Section 2(13)** of the Act of 1899 defines the "Impressed Stamp", which is as under:

"Impressed Stamp" includes

(a) labels affixed and impressed by the proper Officer;
and

(b) stamps embossed or engraved on stamped paper.

Section 10 of the Act of 1899 prescribes the duty how to be paid, which is as under: Duties how to be paid. - (1) Except as otherwise expressly provided in this Act, all duties with which the instruments are chargeable shall be paid and such payment shall be indicated on such instrument by means of Stamps, franked stamps or a certificate endorsed under Sub-section (5), by the Registrar or Sub-Registrar appointed under Section 6 of the Registration Act, 1908 (No, 16 of 1908):

(a) According to the provisions herein contained; or

(b) when no such provision is applicable thereto as the State Government may by rules prescribe:

Provided that if the State Government is satisfied that circumstances exist in public interest to restrict the mode of indicating the payment of duty on any instrument or a particular class of instruments to any or the modes as specified in Sub-section (1), it can do so by an order published in this behalf in the official Gazette.

(2) The rules made under Sub-section (1) may, among other matters, regulate:

(a) in the case of any or all kinds of instruments the number or description of stamps which may be used;

(b) the size or other description of the paper which may be used;

- (c) the types or brand of franking machine or any other such machine used to make impressions on instruments chargeable with duty to indicate payment of duties payable on such instruments; and
- (d) the form of certificates which may be endorsed on the instruments to indicate payment of sums into Government account as stamp duties.

Section 11 of the Act prescribes use of adhesive stamps. As per the aforesaid section, the following instruments may be stamped with adhesive stamp:

- (b) bill of exchange, and promissory notes drawn or made out of India.

Rules Framed in Madhya Pradesh

In exercise of powers conferred under Section 10 of the Act of 1899, State of Madhya Pradesh framed rules known as the Madhya Pradesh Stamp Rules, 1942 (hereinafter referred to as 'the rules of 1942'). Rule 3 of the Rules of 1942 describes the stamps:

Description of Stamps. - (1) Except as otherwise provided by the Act or by these rules.-

- (i) All duties with which any instrument is chargeable shall be paid and such payment shall be indicated on such instrument, by means of stamps issued by the State Government, or the erstwhile State of Madhya Bharat, bearing the words "Madhya Bharat" in Hindi for the purposes of the Act; and
- (ii) a stamp which by any word or words on the face of it is appropriated to any particular kind of instrument, shall not be used for an instrument of any other kind.

Explanation. - Stamps bearing the word 'India' or 'Bharat' in Hindi shall be and shall always be deemed to have been issued by the State Government.

(2) There shall be two kinds of stamps for indicating the payment of duty with which instruments are chargeable, namely:

- (a) impressed stamps, and
- (b) adhesive stamps.

MP Rules amended in 2007

Rule 3 of the Rules of 1942 has further been amended and following substitution has been introduced by virtue of a notification (40) B-4-13-07-2-V dated 15th November, 2007.

Notification (40) B-4-13-07-2-V dated 15th November, 2007. - In exercise of the powers conferred by Sections 10, 74 and 75 of the Stamp Act, 1899 (No. II of 1899), the State Government, hereby makes the following amendment in the Madhya Pradesh Stamp Rules, 1942, namely:

Amendment

In the said rules, for Rule 3, the following rule shall be substituted, namely.- Description of Stamps. - (1) Except as otherwise provided by the Act or by these rules all duties with which any instrument is chargeable shall be indicated on such instrument by means of stamps issued by the State of Madhya Pradesh for the purpose of this Act.

(2) There shall be two kinds of stamps for indicating the payment of duty with which the instruments are chargeable, namely:

(a) impressed stamps over printed with the word "Madhya Pradesh" and bearing Serial Number;

(b) adhesive stamps overprinted with the word "India" in English and word "Bharat" in Hindi.

This notification shall come into force with effect from 1st December, 2007. [Published in M. P. Rajpatra (Asadharan) dated 15-11-2007 Page 1088] The aforesaid notification came into force with effect from 1st December, 2007.

Rule 5 of the Rules of 1942 defines Promissory Note and Bill of Exchange.

5. Promissory notes and bills of exchange. - A promissory note or bill of exchange shall, except as provided by Section 11 or by Rules 13 and 17, be written on paper on which a stamp of the proper value with or without the word "hundi" has been engraved or embossed.

Rule 13 under Chapter III describes use of Adhesive Stamps on certain instruments, which reads as under: Use of adhesive stamps on certain instruments. -- The following instruments may be stamped, with adhesive stamps, namely:

(a) Bill of exchange payable otherwise than on demand and drawn in sets, when the amount of duty does not exceed ten naye paise for each part of the set.

(b) Transfers of debentures of public companies and associations.

(c) Copies of maps or plans, printed copies and copies of or extracts from, registers given on printed forms

chargeable with duty under Article 24 of Schedule I-A.

(d) Instruments chargeable with stamp duty under Article 1, 5(a) and (b), 19, 28, 36 and 43 of Schedule I-A.

(e) Instruments chargeable with stamp duty Article 47 of Schedule I.

(f) Instruments chargeable with stamp duty under Articles 37, 49(a)(ii) and (iii) and 52 of Schedule I and

(g) Bonds executed under any law relating a central duty of excise or any rules made thereunder.

Article 49 of Schedule I is as follows:

49. Promissory Note [as defined by Section 2(22)]:

(a) When payable on demand:

(i) When the amount or value does not exceed Rs. 250;
- Ten nayepaise

(ii) When the amount or value exceeds Rs. 250 but does not exceed Rs. 1,000; - Fifteen nayepaise

(iii) In any other case - Twenty Five nayepaise

(b) When payable otherwise than on demand: The same duty as a Bill of Exchange (No. 13) for the same amount payable otherwise than on demand.

Amended in 2004

It has been amended by Ministry of Finance (Department of Revenue) Order No. S.O. 130(E) dated 28th January, 2004 published in the Gazette of India Part II Section 3(ii) dated 28th January, 2004, reads as under:

Promissory Note (As defined by Section 2(22):

(a) When payable on demand:

(i) When the amount or value does not exceed Rs. 250;

- Five paise

(ii) When the amount or value exceeds Rs. 250 but does not exceed Rs. 1,000; - Ten paise

(iii) In any other case - Fifteen paise

(b) When payable otherwise than on demand: The same duty as a Bill of Exchange (No. 13) for same amount payable otherwise than on demand.

Explained by court

Rule 17 of the Rules of 1942 prescribes 'adhesive stamp or stamps denoting duty of 'ten naye paise' or 'five naye paise' as under: Adhesive stamp or stamps denoting duty of ten naye paise or five naye paise. - Except as otherwise provided by these rules, the adhesive stamps used to denote duty shall be the requisite number of stamps bearing the words "Twenty-five naye Paise" or "Fifteen naye paise" or "ten naye paise" or "Five naye paise" and such stamps may be inscribed for use for revenue.

From the Rule 5 of the Rules of 1942, it is clear that a Promissory Note has to be written on a paper on which a stamp of the proper value with or without the word "hundi" has been engraved or embossed.

Article 49 of the Schedule I prescribes the duty which has to be paid on a promissory note by way of affixing of a particular denoting stamp and Rule 17 of the Rules of 1942 prescribes the Adhesive Stamp used to denote duty shall be the requisite number of stamps bearing the words "Twenty-five naye Paise" or "Fifteen

naye Paise" or "Ten naye Paise" or "Five naye Paise" and such stamps may be inscribed for use of revenue.

From the aforesaid rules, it is clear that the word 'use of revenue' has been mentioned with the word 'and such stamps may be inscribed' and the meaning of the aforesaid word could not mean that 'if the word for revenue' has not been mentioned with the word 'stamp which has to be affixed on a promissory note', then the promissory note is inadmissible in evidence, because the purpose of the Stamp Act and Rules, is to secure revenue for State. It is a fiscal enactment. Rule 3(2) of the Rules-of 1942 prescribes only two types of stamps; 'impressed stamp and adhesive stamp' and Rule 17 clearly prescribes 'adhesive stamp' denoting the duty of "Twenty-five naye paise" or "Fifteen naye paise" or "Ten naye paise" or "Five naye paise". The aforesaid stamps have to be used for the purpose of payment of revenue on a promissory note and when a adhesive stamp of correct value is embossed on a promissory note, then certainly the promissory note is admissible in evidence .

Even deficit can be paid later.

The Hon'ble Supreme Court in the case of Thiruvengadam Pillai v. Navaneethammal and Anr. MANU/SC/0942/2008 : (2008) 4 SCC 530 has considered the fact of some anomaly in the stamp paper in view of Stamp Act and question of admissibility of those documents in evidence and held as under: 13. The Stamp Act is a fiscal enactment

intended to secure revenue for the State. In the absence of any rule requiring consecutively numbered stamp papers purchased on the same day, being used for an instrument which is not intended to be registered, a document cannot be termed as invalid merely because it is written on two stamp papers purchased by the same person on different dates. Even assuming that use of such stamp papers is an irregularity, the Court can only deem the document to be not properly stamped, but cannot, only on that ground, hold the document to be invalid. Even if an agreement is not executed on requisite stamp paper, it is admissible in evidence on payment of duty and penalty under Section 35 or 37 of the Stamp Act, 1899. If an agreement executed on a plain paper could be admitted in evidence by paying duty and penalty, there is no reason why an agreement executed on two stamp papers, even assuming that they were defective, cannot be accepted on payment of duty and stamp. But admissibility of a document into evidence and proof of genuineness of such document are different issues.

A Division Bench of this (Madhya Pradesh High Court) Court in the case of Ganpatsingh v. Gurucharansingh reported in MANU/MP/0002/1973 : 1972 MPLJ 616 has held that if an instrument stamped in accordance with the Article 49(a)(iii) of Schedule I to the Indian Stamp Act is valid, it may be admissible in evidence. The relevant findings of the Division Bench in the aforesaid case are as under: The

use of the erstwhile Madhya Bharat Stamp in the State of Madhya Pradesh is justified by Rule 3 made by the State Government. As for the use of the adhesive stamp we find it permitted by Rule 13(f) this being an instrument that has to be stamped in accordance with Article 49(a)(iii) in Schedule I, to the Indian Stamp Act. Accordingly, this application is also without any force. The trial Court has addressed itself only to the preliminary issue though some remarks have been made in the judgment regarding the merits. They should of course be ignored while the trial Court examines the merits in a formal manner. This case is also sent back to the trial Court for disposal on merits.

When there is irregularity in use of stamp, that does not amount to invalidity of document

From the aforesaid judgment of the Hon'ble Supreme Court in Thiruvengadam Pillai v. Navaneethammal and Anr. MANU/SC/0942/2008 : (2008) 4 SCC 530 and the Division Bench's judgment of this Court in Ganpatsingh v. Gurucharansingh reported in MANU/MP/0002/1973 : 1972 MPLJ 616, it is clear that if there is any irregularity in the use of stamp, then on this ground the document could not be termed as invalid or could not be classified as inadmissible in evidence.

Impossibility to perform - stamps may be inscribed is not mandatory

Question of admissibility of the pronote has to be considered in the light of the fact mentioned in the letter, dated 11-8-2010 that special adhesive stamp of

Re. 1/- inscribing the word 'revenue' was never printed. It means that special adhesive stamp of Re. 1/- inscribing the word 'revenue' was never available for use. In such circumstances, if it is held that a pronote without affixture of special adhesive stamp inscribing the word 'revenue' is inadmissible in evidence, it would mean an impossibility to be performed because no such adhesive stamp was printed by the Security Press.

The Hon'ble Supreme Court in *Deewan Singh and Ors. v. Rajendra Pd. Ardevi and Ors.* reported in MANU/SC/0207/2007 : (2007) 10 SCC 528 held that where literal interpretation shall give rise to an anomaly or absurdity, the same should be avoided. The relevant dictum is as under: 43. Although golden rule of interpretation viz. Literal rule should be given effect to, if it is to be held that the Devasthan Commissioner appointed under Section 7 of the Act would be an agency of the State, the same would lead to an absurdity or anomaly. It is a well-known principle of law that where literal interpretation shall give rise to an anomaly or absurdity, the same should be avoided.

In Rule 17 of the Rules of 1942, it has mentioned 'such stamps may be inscribed for; use of revenue'. The word 'may' is not the word of compulsion, it is an enabling word and it only confer capacity, power or authority and imply a discretion.

Use of word 'May' explained

The Hon'ble Supreme Court in the case of *Societe De Traction et D'Electricite Societe Anonyme v. Kamani Engineering Co. Ltd.* **MANU/SC/0082/1963 : AIR 1964 SC 358** has held in regard to use of word 'may' as under: 9. It cannot be disputed that the use of the expression 'may' is not decisive. Having regard to the context, the expression 'may' used in a statute has varying significance. In some contexts it is purely permissive, in others, it may confer a power and make it obligatory upon the person invested with the power to exercise it as laid down.

The Hon'ble Supreme Court further in the case of *State of U.P. v. Jogendra Singh* **MANU/SC/0221 /1963 : AIR 1963 SC 1618** has held as under: 8. Rule 4(2) deals with the class of gazetted government servants and gives them the right to make a request to the Governor that their cases should be referred to the Tribunal in respect of matters specified in Clauses (a) to (d) of Sub-rule (1). The question for our decision is whether like the word "may" in Rule 4(1) which confers the discretion on the Governor, the word "may" in Sub-rule (2) confers the discretion on him, or does the word "may" in Sub-rule (2) really mean "shall" or "must"? There is no doubt that the word "may" generally does not mean "must" or "shall". But it is well-settled that the word "may" is capable of meant, "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed

to mean a command. Sometimes, the Legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. In the present case, it is the context which is decisive. The whole purpose of Rule 4(2) would be frustrated if the word "may" in the said rule receives the same construction as in Sub-rule (1). It is because in regard to gazetted government servants the discretion had already been given to the Governor to refer their cases to the Tribunal that the rule-making authority wanted to make a special provision in respect of them as distinguished from other government servants falling under Rule 4(1) and Rule 4(2) has been prescribed, otherwise Rule 4(2) would be wholly redundant. In other words, the plain and an ambiguous object of enacting Rule 4(2) is to provide an option to the gazetted government servants to request the Governor that their cases should be tried by a Tribunal and not otherwise. The rule-making authority presumably thought that having regard to the status of the gazetted government servants, it would be legitimate to give such an option to them. Therefore, we feel no difficulty in accepting the view taken by the High Court that Rule 4(2) imposes an obligation on the Governor to grant a request made by the gazetted government servant that his case should be referred to the Tribunal under the Rules. Such a request was admittedly made by the Respondent and has not been granted. Therefore, we are satisfied that the High

Court was right in quashing the proceedings proposed to be taken by the Appellant against the Respondent otherwise than by referring his case to the Tribunal under the Rules.

The Single Judge of Madras High Court in the case of P. Moorthy v. A. R. Kothandaraman **MANU/TN/0253 /1978 : AIR 1978 Mad 412** has held as under in regard to word 'may' used in Rule 13 framed by the State of Tamil Nadu under the provisions of Indian Stamp Act: 4. I find there is force in the contention put forth by the learned Counsel for the Respondent Section 10 of the Indian Stamp Act lays down that "Except as otherwise expressly provided in this Act, all duties with which any instruments are chargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps:

- (a) according to the provisions herein contained; or
- (b) when no such provision is applicable thereto, as the State Government may by rule direct.

Section 11 of the Indian Stamp Act lays¹ down that the instruments set out under Clauses (a) to (e) thereunder may be stamped with adhesive stamps. Clause (b) of Section 11 refers to 'bills of exchange, and promissory notes, drawn or made out of India'. Obviously, this clause would not apply to the case in question. Coming to the rules framed under the Act by

¹ In Karnataka stamp act 1957 at section 11 also it is stated that Adhesive stamps chargeable with duty not exceeding fifty paise, the word may is used making it discretionary. In Rule 11 of Karnataka stamp rules 1958, it is not mandatory to use adhesive stamps because word may is used.

the State of Tamil Nadu, Rule 5 reads as follows:
Promissory notes and bill of exchange - A promissory note or bill of exchange shall except as provided by Section 11 or by Rule 13, be written on paper on which a stamp of the proper value, with or without the word 'hundi', has been engraved or embossed.

It will be relevant to refer to Rule 13 also because Rule 5 referred to above, states that a promissory note or bill of exchange shall except as provided...or by Rule 13 be written on paper on which a stamp of the proper value has been engraved or embossed. Rule 13 reads as follows-

13. Use of adhesive stamps on certain instruments. - The following instruments may be stamped with adhesive stamps namely:

- (a) transfers of debentures of public companies and associations,
- (b) copies of maps or plans, printed copies and copies of or extracts from registers given on printed forms when chargeable with duty under Article 24 of schedule I,
- (c) instruments chargeable with duty under Article 5(a) and (b) of schedule I,
- (d) instruments chargeable with stamp duty under Article 47 of schedule I,
- (e) instruments chargeable with stamp duty under Articles 19, 36, 37, 49 (a) (ii) and (iii) and 52 of schedule I,
- (f) instruments of transfer of shares of public companies or associations,

(g) bonds executed under any law relating to a central duty of excise or any rule made thereunder,

(h) deleted....

(i) security bonds to be furnished by an Appellant or an Applicant in revision under the provisions of Section 31(5), 33(4), 35(4), 36(5), 37(6) or 38(6) and authorisation to be furnished under Section 52 of the Madras General Sales Tax Act, 1959 (Madras Act I of 1959). Article 49(a)(ii) of schedule I relates to promissory notes where the amount or value exceeds Rs. 250 but does not exceed Rs. 1000 and Article 49(a)(iii) of schedule I relates to promissory note of any other case.

The expression used in Rule 13 of the Rules is 'may'. Interpreting similar rules framed by State of Rajasthan Jagat Narayan J. in *Kalwan Singh v. Bhanwarlal* **ILR (1965) Raj 231** held that: The rule is merely a permissive one, permitting the use of an adhesive stamp on promissory notes payable on demand when the amount or value exceeds Rs. 250. The rule does not lay down that such promissory note shall be stamped with adhesive stamp of the requisite value. The result is that a promissory note exceeding Rs. 250 in value can be written on a paper having an impressed stamp or it can be stamped with adhesive stamps of the requisite value

5. The same learned judge pronounced the same view in *Somdatta v. Abul Rashid* **MANU/RH/0012/1968 : AIR 1968 Raj. 45** and the learned Judge observes that in view of the word 'may' used in the provisions

the promissory notes of any value can also be written on impressed stamps.

Conclusions

From the aforesaid decisions of the Hon'ble Supreme Court quoted above, and the judgment of the learned Single Judge of Madras High Court, it can be safely held that the **word 'may' used in Rule 17 of the Rules of 1942 is of permissive in nature.**

On the basis of aforesaid discussion, we answer the reference accordingly:

- (i) That, keeping in view the two kinds of stamps mentioned in Sub-rule (2) of Rule 3 of the Madhya Pradesh Stamp Rules, 1942, the 'special adhesive stamp' be treated as in addition to 'adhesive stamp' not opposed or in contradistinction to 'adhesive stamp' as required for promissory note.
- (ii) That, word 'may' used in Rule 17 of the Madhya Pradesh Stamp Rules, 1942 is an enabling word and implies a discretion.
- (iii) That, the decisions of the learned Single Judge in the case of Ismail Khan v. Ram Prakash Verma MANU/MP/0059/2000 : 2000 (2) MPLJ 104 : 2000 (i) MPJR 51 and Division Bench in the case of Khamir Singh v. Radheshyam Bansal MANU/MP/0323/2010 : 2011 (1) MPLJ 43 : 2010 (5) M.P.H.T. 249 (DB) are not good law in view of earlier Division Bench's judgment of this Court in the case of Ganpatsingh and Anr. v. Guracharansingh and Anr. MANU/MP/0002 /1973 : AIR 1973 MP 3 : 1972 MPLJ 616 and also on

the basis of our findings recorded above in the judgment.

IN KARNATAKA STAMP DUTY ON LOAN DOCUMENTS (Upto 2019)¹

1. At present for Deposit of Title deeds stamp duty is fixed at Rs 500 minimum to Rs 2000 maximum. (Article-6).
2. For pawn and pledge of moveable property from 0.1% From 1 lakh upto 10 lakhs loan. When exceeding ten lakhs 0.2% maximum Rs 2000-00 for above ten lakhs (Article-6).
3. Upto 1 lakh jewelry loan or loan on goods, exemption of stamp duty is there. (Article-6).
4. Mortgage deed with possession same as conveyance. (Article -34)
5. Mortgage deed without possession 50 paisa for every 100 Rs. (Article -34)
6. Collateral security 10 for Rs 1000 and Rupees one for further every Rs 1000. (Article -34)
7. Hypothecation of moveable property Rs 10 for every 10,000 upto ten lakh Rupees. When exceeding Ten Lakh Rupees Rs 20 for every 10,000 subject to maximum Rs 10 Lakhs. (Article -34)
8. Debt written and signed by Debtor from Rs 100 to Rs 5000 debt stamp duty is Rs 2, exceeding Rs 5000

¹ <https://www.karnataka.gov.in/karigr/Pages/-At-a-Glance--Stamp-Duty-and-Registration-Fee.aspx>

Rs 2 for every thousand subject to maximum of Rs 1000. (Article -1)

9. Valuation of property - Rs 100 exceeding Rs 1000 value. (Article-8)

10. Instrument imposing further charge on mortgaged property stamp duty prescribed under Article 27.

11. Bond as defined by section 2 (1) (ab)¹ where the amount or value secured does not exceed Rs 1000 - Fifty paise for every one hundred rupees or part thereof. Where it exceeds Rs 1000 same duty as said above upto Rs 1000 and for every Five hundred or part thereof Rs 2-50 (Article 12)

12. Indemnity bond, Security bond or mortgage deed executed by way of security for due execution of office or to account for money or other property received by virtue thereof, or execution by a surety to secure the due performance of a contract. The stamp duty upto Rs 1000 secured amount is 50 ps for every hundred to Rs 5 for upto Rs 1000. Then Maximum Rs 200 above secured amount of Rs 1000 or in any other case. There are several exemptions also. (Article 47).

STAMP DUTY BY WHOM PAYABLE

¹ (ab) "bond" includes,— (i) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed or is not performed, as the case may be; (ii) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and (iii) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another;

Under Karnataka Stamp Act Section 30. Duties by whom payable.- In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne,—

(a) in the case of any instrument described in any of the following Articles of the Schedule, namely

No. 2 (Administration Bond),

No. 6 (Agreement relating to deposit of title deeds, pawn or pledge)

No. 12 (Bond),

No. 13 (Bottomry Bond),

No. 23 (Customs Bond),

No. 27 (Further Charge),

No. 29 (Indemnity Bond),

No. 34 (Mortgage Deed),

No. 45 (Release),

No. 46 (Respondentia Bond),

No. 47 (Security Bond or Mortgage Deed).

No. 48 (Settlement),

No. 52 (a) (Transfer of Debentures, being marketable securities, whether the debenture is liable to duty or not),

No. 52 (b) (Transfer of any interest secured by a bond, mortgage deed or policy of insurance),

by the person drawing, making or executing such instrument;

(b) in the case of a conveyance (including a reconveyance of mortgaged property) by the grantee;

in the case of a lease or agreement to lease—by the lessee or intended lessee;

(c) in the case of a counterpart of lease—by the lessor;

(ca) in the case of power of attorney by the principal;

(d) in the case of an instrument of exchange—by the parties in equal shares;

(dd) in the case of a certificate of enrolment in the roll of advocates maintained by the State Bar Council—by the Advocate enrolled;

(e) in the case of a certificate of sale—by the purchaser of the property to which such certificate relates; and

(f) in the case of an instrument of partition—by the parties thereto in proportion to their respective shares in the whole property partitioned, or, when the partition is made in execution of an order passed by a Revenue authority or Civil Court or arbitrator, in such proportion as such authority, Court or arbitrator directs.

(g) in the case of an acknowledgement of debt [Art. 1(i)] - by the Debtor;

(h) in the case of an acknowledgement of a letter, article, etc., [Art. 1(ii)] - by the Person owning the letter, article etc.,;

(i) in the case of an adoption deed [Art.3]- by the adopter;

(j) in the case of an affidavit [Art.4] - by the executant;

(k) in the case of an agreement for sale of bill of exchange [Art.5(a)]- by the Purchaser;

(l) in the case of an agreement for purchase or sale of a Government security [Art.5(b)]- by the purchaser;

(m) in the case of an agreement for purchase or sale of shares, stocks [Art.5(c)]- by the purchaser;

(n) in the case of an agreement for transaction of lease-cum- sale[Art.5(d)] - by the lessee;

(o) in the case of any instrument of lease-cum-sale effected by the Bengaluru Development Authority or the Karnataka Housing Board [Art.5 (da)] - by the Lessee;

(p) in the case of agreement for sale of immovable property [Art.5(e)] - by the purchaser;

(q) in the case of agreement for construction or development of an immovable property [Art.5(f)] - by the developer;

(r) in the case of agreement for sale of movable property [Art. 5(g)]- by the purchaser;

(s) in the case of agreement to mortgage [Art. 5(h)]- by the mortgager;

(t) in the case of contract between the Depository Participant and client for opening de-mat account [Art.5 (i)] - by the client;

(u) in the case of agreement relating to contract between stock broker or sub broker and client (principal) for Stock Market operations [Art. 5 (i-a)] - by the client;

(v) in the case of agreement relating to advertisement or telecasting or broadcasting of programs for promotion and development of business [Art.5(ib)] - by the advertiser;

(w) in the case of agreement relating to assignment or transfer of intellectual property rights [Art.5(i-c)] - by the assignee;

(x) in the case of agreement relating to building works or labour or services (works contracts) [Art.5 (i-d)] - by the person entrusting the works or availing the services;

(y) in the case of chit agreement [Art.5(i-e)] - by the chitster;

(z) in the case of agreement if not otherwise provided for [Art.5(j)] - by the executant;

(za) in the case of appointment in execution of a power [Art.-7] - by the executant;

(zb) in the case of appraisement or valuation [Art.-8] - by the person availing the services;

(zc) in the case of apprenticeship deed [Art.-9] - by the apprentice;

(zd) in the case of articles of association of a company [Art.-10] - by the company;

(ze) in the case of award [Art.-11] - by the awardee;

(zf) in the case of cancellation of instruments [Art.-14] - by the executant;

(zg) in the case of certificate or other document evidencing the title of the holder thereof or any other person, either to any share, scrip or stock [Art.-16]- by the company issuing share, scrip or stock;

(zh) in the case of charter-party [Art.-18]- by the charterer or shipper;

(zi) in the case of clearance list [Art.18-A]- by the investors;

(zj) in the case of composition deed [Art.19]- by the debtor;

(zk) in the case of copy or extract [Art.21]- by the applicant;

(zl) in the case of counterpart or duplicate [Art.22]- by the person who paid the stamp duty on the original document;

(zm) in the case of delivery order in respect of goods [Art.24] - by the importer;

(zn) in the case of divorce deed of marriage [Art.25]- by the divorcer;

(zo) in the case of gift deed [Art.28]- by the donee;

(zp) in the case of letter of allotment of shares, in any company [Art.31]- by the company;

(zq) in the case of letter of licence [Art.32] - by the debtor;

(zr) in the case of licence of immovable or moveable property [Art.32-A] - by the licensee;

(zs) in the case of memorandum of association of a company [Art.33] - by the company;

(zt) in the case of mortgage of a crop [Art.35] - by the mortgagor;

(zu) in the case of Notarial act [Art.36] - by the applicant;

(zv) in the case of Note or Memorandum or record of transactions (electronic or otherwise) - Sent by a broker or agent [Art.37]- by the Investors;

(zw) in the case of Note of protest by the master of a ship [Art.38]- by the charterer or shipper or the consignee or the importer as the case may be;

(zx) in the case of partnership- instrument of constitution [Art.40(A)] - by the partnership firm;

(zy) in the case of partnership- instrument of reconstitution [Art.40(B)] - by the partnership firm;

(zz) in the case of partnership – instrument of dissolution [Art.40-(C)(a)] - by the outgoing partner to whom the property is allotted;

(zza) in any other case [Art.40-(C)(b)]- by the partnership firm;

(zzb) in the case of limited liability partnership [Art.40-A]- by the limited liability partnership;

(zzc) in the case of protest of bill or note [Art.42] - by the beneficiary;

(zzd) in the case of protest by the master of a ship [Art.43]- by the charterer or shipper or the consignee or the importer as the case may be;

(zze) in the case of share warrants, to bearer issued under the Companies Act. [Art.49]- by the company;

(zzf) in the case of shipping order [Art.50]- by the shipper;

(zzg) in the case of surrender of lease [Art.51]- by the lessee;

(zzh) in the case of transfer- of any property under section 25 of the Administrator General Act, 1963 [Art.52-(c)]- by the beneficiary;

(zzi) in the case of transfer- of any trust property [Art.52-(d)]- by the trust or trustee or beneficiary as the case may be;

(zzj) in the case of transfer of lease [Art.53] - by the transferee;

(zzk) in the case of transfer of licence [Art.53-A]- by the transferee;

(zzl) in the case of Trust- declaration of or concerning, any property [Art.54]- by the author of the Trust; and

(zzm) in the case of warrant for goods [Art.55]- by the owner of the goods;”

CONSEQUENCES OF INCOMPLETE DOCUMENTS SIGNED

"Section 20 of Negotiable Instruments act 1881 says: Inchoate stamped instruments:-Where one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives prima facie authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument, for any amount specified therein and not exceeding the amount covered by the stamp. The person so signing shall be liable upon such instrument, in the capacity in which he signed the same, to any holder in due course for such amount; provided that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder."

S.M. Ningappa vs. D.R. Vishwanath : MANU/KA/8297 /2019

Section 20 of Negotiable Instruments act 1881

6. On careful perusal of the said provision this Section clearly imposes a serious liability upon the person who allows an incomplete negotiable instrument to fill it up later he must be strictly liable. That means when once an instrument has been given in favour of a person admitting some liability on the basis of those documents, keeping open the said blanks to be filled up by the other party, if he fill up on any future date i.e. within a reasonable time, then the executant cannot found fault with the person who filled up the said document because of the authority given to the said person. It cannot at any stretch of imagination be said that the said document has been tampered or material alteration has been made in the document. The only defence available under the said Section is that the person who is the holder of said promissory note or the cheque cannot recover any amount in excess of the amount intended by the drawer to be paid under the instrument. Therefore, if there is no allegation that the cheque has been filled up by the complainant in excess of amount than the liability of the accused, no other ground is available to the accused.

7. The meticulous perusal of Section 20 of Negotiable Instruments Act shows that it is neither the case of material alteration of the cheque or fabrication or forgery, it is only an implied authority given to the

holder of the cheque at the time of entrusting blank cheque containing the signature of the accused to fill up the column therein. Pursuant to the implied authority, if the columns are filled up mentioning the date, amount and figures, it will not amount to any offence much-less an offence under Sections 468 and 471 of the Indian Penal Code. Under the provision of Section 20 of the Negotiable Instruments Act, the Court has to see whether the cheque has been filled up within a reasonable time. It appears that the cheque has been presented in accordance with law and notice has been issued to the other side.

The Hon'ble Apex Court in a recent judgment in Bir Singh v. Mukesh Kumar, MANU/SC/0154/2019 : (2019) 4 SCC 197, has observed that it is immaterial that the cheque is filled up by any person other than the drawer provided it is duly signed by the drawer. The same would not invalidate the cheque and shall attract the presumption under Section 139 of the Negotiable Instruments Act and if the cheque is otherwise valid, the penal provisions of Section 138 would be attracted. However, the said presumption is rebuttable and can be rebutted by the accused by proving the contrary by adducing cogent and reliable evidence that there was no debt or liability.

S.K. Prabhu vs. K. Giridhar Rao : MANU/KA/6903/2019

Section 20 of Negotiable Instruments act 1881

On going through the said section the person who signs shall be liable such negotiable instrument, though it has been issued either wholly blank or having written thereon an incomplete documents, he authorize to complete the negotiable instrument and present before the Bank.

**T. Nagappa vs. Y.R. Muralidhar: AIR 2008 SC 2010
- MANU/SC/7523/2008 - (2008) 5 SCC 633**

Section 20 of Negotiable Instruments act 1881

By reason of the aforementioned provision only a right has been created in the holder of the cheque subject to the conditions mentioned therein. Thereby only a prima facie authority is granted, inter alia, to complete an incomplete negotiable instrument. The provision has a rider, namely, no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid therein.

7. When a contention has been raised that the complainant has misused the cheque, even in a case where a presumption can be raised under Section 118(a) or 139 of the said Act, an opportunity must be granted to the accused for adducing evidence in rebuttal thereof. As the law places the burden on the accused, he must be given an opportunity to discharge it. An accused has a right to fair trial. He has a right to defend himself as a part of his human as also fundamental right as enshrined under Article 21 of the Constitution of India.

In Kalyani Bhaskar v. M.S. Sampooranam: **MANU/SC/0001/2007 : (2007) 2 SCC 258**, the Apex Court has held that, adducing evidence in support of the defence is a valuable right and denial of that right would mean denial of fair trial. In that case, the Apex Court allowed the application filed by the accused for sending the cheque for the opinion of the handwriting expert, holding that the Magistrate should have granted such a request unless he thinks that the object of the accused is vexation or delaying the criminal proceedings. This decision, therefore, is an authority for the proposition that, if the intention of the accused is to protract the proceedings, the request for sending the cheque for expert opinion can be rejected.

Delhi High Court in Rambir Sharma v. M/s. HBN Housing Finance Ltd., MANU/DE/3194/2017, 2018 (1) JCC 1 wherein it was observed that there was no requirement for obtaining the opinion of the handwriting expert as the petitioner has clearly admitted having signed on the blank cheque. " In my considered opinion there is no requirement for obtaining the opinion of the handwriting expert as the petitioner has clearly admitted having signed on the blank cheque and given to the respondent. Section 20 of the NI Act permits the drawer to fill the amount as well as the date in a blank signed cheque and thus complete the inchoate instrument delivered to him.

The argument raised by the learned counsel for the petitioner that presentation of cheques of subsequent number series prior to the cheque in question is of no consequence nor the opinion of a handwriting expert is required to be called for in view of the above observations."

INCOMPLETE DOCUMENT TURNING AS NEGOTIABLE INSTRUMENT EXPLAINED

**Nikhil P Gandhi vs. State of Gujarat and Ors.:
MANU/GJ/0882/2016 - (2016) 4 GLR 2838 - 37.**

Section 20 deals with the inchoate stamped instruments., and the scheme of that section is that when a person signs and delivers to another person an inchoate document which is properly stamped in accordance with the law relating to negotiable instruments, then by doing so he gives a prima facie authority to the holder to complete the document., the authority being restricted to filling the amount not exceeding that which would be covered by the stamp upon the document. When the document is completed and becomes a negotiable instrument., then the maker of the document is liable to any holder in due course for the amount which has been filled in the document. The proviso to Section 20 lays down that no person other than a holder in due course shall recover from the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder. It will be noticed that the right

given to complete the document is given to the holder and the holder contemplated in this section is not the holder as defined in the Act itself because it is clear that that definition cannot apply to this expression in Section 20, but "holder" is used in this section in the literal sense of that word, viz., the person who actually holds the document. The section further contemplates that if the holder having completed the document negotiates it then the person who by reason of such negotiation becomes a holder in due course has a right to proceed against the maker and recover the amount mentioned in the document. Therefore, the section provides for two rights in respect of two different persons. One is the right given to the holder of the document, the person who is in possession of the document, the document being an inchoate document, and that right is the right to complete it. The other right conferred is upon the holder in due course, and that right is that even though the holder in due course might come in possession of a negotiable instrument which was not wholly completed by the maker, he has the same right against the maker as if he had himself written out the whole of the document, if the document has been completed by a person who has come into possession of it as contemplated by Section 20. Therefore, a person who permits an incomplete document to go out into the world by giving and delivering it to any person, takes the risk of having to discharge the liability, which may be provided under the document

by the amount being filled in, to the person who bona fide and for consideration comes into possession of that document. That seems to be the scheme of Section 20.

38. Thus, to constitute an inchoate stamped instrument within the purview of Section 20 Negotiable Instruments Act it shall have the following ingredients.

- (1) The instrument shall be stamped.
- (2) It should be stamped in accordance with law relating to the negotiable instruments then in force in India.
- (3) The instrument should either be wholly blank or contains an incomplete instrument and
- (4) The instrument is signed and delivered to another making him holder of such instrument.

Before an instrument acquires the status of a full-fledged negotiable instrument, the two under mentioned conditions should be satisfied.

- (i) only the holder of the such instrument thereof in the physical sense can make or complete the same.
- (ii) provided however that the amount to be specified therein does not exceed the amount which could be covered by the stamp.

Therefore:-

- (i) a person who makes himself the payee of an inchoate document by writing up or completing the negotiable in a blank paper cannot be regarded as a holder in due course of that document. It follows therefore, that he cannot render liable the maker or

the person who signed that blank document as a person who is liable under the Negotiable Instruments Act within the meaning of the second part of Section 20.

(ii) Until the drawee's name is inserted before filing of the suit, the instrument is not a promissory note in the eye of law; the holder cannot recover the amount on the instrument; even the permission granted by the court to fill the name would not cure the defect in the instrument.

(iii) A printed promissory with the space for rate of interest being blank is not an incomplete instrument, if enables the promisee to fill up the same so as to complete the instrument within the meaning of Section 20.

(iv) The instrument may be wholly blank or incomplete in any particular in either case, the holder has the authority to make or complete the instrument as a negotiable one. The authority implied by a signature to a blank instrument, is so wide that the party so signing is bound to be a holder in due course even though the holder was authorized to fill for a certain amount, and he in fact inserts a greater amount, but it is necessary that sum ought not to exceed the amount covered by the stamp.

BLANK CHEQUE AND ITS IMPLIED AUTHORITY TO FILL

Nikhil P Gandhi vs. State of Gujarat and Ors.:
MANU/GJ/0882/2016 - (2016) 4 GLR 2838 39.

Section 6 of the N.I. Act defines a "cheque" as under: "A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Explanation I.-For the purposes of this section, the expressions-

(a) "a cheque in the electronic form" means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed in a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system;

(b) "a truncated cheque" means a cheque which is truncated during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

Explanation II.-For the purposes of this section, the expression "clearing house" means the clearing house managed by the Reserve Bank of India or a clearing house recognised as such by the Reserve Bank of India.]"

40. Section 5 of the N.I. Act defines a "bill of exchange" as under: "A "bill of exchange" is an

instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

Therefore, a combined reading of Sections 5 and 6 would make it clear that an instrument would be a cheque if only it contains the particulars as mentioned in the two sections referred to above. If the drawee's name is not written in the instrument, that instrument cannot even be termed to be a bill of exchange. Therefore, if it is only a signed blank cheque leaf, it cannot be said to be a cheque within the meaning of Section 6 of the Act.

41. Section 13 of the N.I. Act defines a negotiable instrument as under: "A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer."

Explanation to Section 13 also would make it clear that it must be an instrument containing all the particulars referred to earlier.

42. If only it is a negotiable instrument within the meaning of Section 13 of N.I. Act, Section 87 would have any application. If it was only a signed blank cheque leaf, it cannot be termed as a 'negotiable instrument', and if so the question of effecting material alteration of that paper (signed cheque leaf) does not arise.

43. If it is only a signed blank cheque leaf that was handed over it cannot be said to be a paper stamped in accordance with law relating to the negotiable

instruments. As such the contention that, whether it is wholly blank or filled up partly making it an incomplete document and that handing over of the same would give authority to the holder thereof to make or complete the instrument as the case may be for any amount specified therein and not exceeding the amount covered by the stamp, cannot be sustained. So far as a cheque is concerned, if it is a signed blank cheque leaf it may be filled up showing any amount without any restriction what so ever and if that be so, how Section 20 of the N.I. Act can be applied to a case of cheque. But if it is a paper stamped, it can be filled up showing the amount not exceeding the amount covered by the stamp. That is the rationale behind why Section 20 is specifically made applicable to the stamped documents/instruments.

45. It can be argued that when a person takes a bill in an incomplete form, he cannot be a bona fide holder for value since it can only be said that he has taken a piece of blank paper and not a bill and that he can take it as a bill only under the authority given to his transferor. Section 20 of the Act would make it clear that there can be no material alteration of a cheque leaf only for the reasons that it was subsequently filled up. But at the same time it cannot be said that when ever a signed blank cheque leaf is given, it gives authority to the holder to fill up the same according to his whims and fancies. Filling up of a signed blank cheque leaf may not attract section 87 of the N.I. Act,

for, there was no insertion, interlineation, erasure, alteration etc, because there was no completed negotiable instrument within the meaning of sections 5, 6 and 13 of the N.I. Act. Therefore, neither section 20 nor section 87 applies to a blank signed cheque leaf. If so, the question must turn round to the actual execution of the instrument.

46. With regard to the instruments other than a cheque, an implied authority is given to the holder at the time of entrusting it to fill up the same. There may be instances where an implied authority is given to the person, at the time of entrusting a signed blank cheque containing the signature of the drawer of the cheque, to fill the columns therein.

47. If a principal or employer deposes his agent or employee to purchase an article and if the dealer fills up that signed blank cheque leaf showing the exact amount covered by the bill showing the price of the article sold then it cannot be said that what was handed over by the drawer of the cheque is only a signed blank cheque leaf. In such cases an implied authority to the trader/seller of the article to fill up the cheque leaf can certainly be inferred. Similarly, there may also be cases where at the time of settlement of the accounts, a particular amount was found payable by the drawer of the cheque to the other party and if a signed blank cheque entrusted to be filled up later is filled up in tune with the accounts, showing the actual amount payable by the drawer of the cheque to the other party, then also it can be said

that there was the implied authority to fill up the signed blank cheque leaf. There may be such instances where the sum is ascertainable and the signed blank cheque leaf is given to fill up the same after ascertaining the same. In such cases there would be no difficulty to infer an implied authority given by the drawer. Simply because the cheque is seen filled up or written in the hand writing of another person it cannot lead to a conclusion that only a signed blank cheque leaf was given. The person signing the cheque may have difficulty due to many reasons to write the cheque and it might have been filled up by the payee or by another. In such cases it cannot be said that what was handed over was only a signed blank cheque leaf. In all such cases the ultimate conclusion may depend upon the proof of the transaction and execution of the instrument. It must also be held that when it is a case that only a signed blank leaf was handed over by the accused, then he must offer satisfactory explanation as to the circumstances under which the signed blank cheque happened to be handed over. Considering the totality of the evidence and circumstances, it is for the court to draw the inference as to whether it was given with an implied authority to fill up the same showing the amount ascertained or ascertainable to discharge the debt or liability. Therefore, there may be such cases where implied authority can be inferred. But the contention that when a signed blank cheque leaf is handed over, it can never be filled up and that if it is filled up it

would amount to a material alteration within the meaning of using Section 87 of the N.I. Act, does not stand to rhyme or reason. Similarly, the contention that Section 20 of the N.I. Act is applicable to an unfilled or blank cheque leaf also cannot be accepted. It would depend upon the facts of each case. Therefore, it is neither a case which attracts Section 87 of the N.I. Act nor is it a case where the complainant can rely upon Section 20 of the N.I. Act and contend that as a signed blank cheque leaf is given it gives an authority to fill up the same according to the whim and fancy of the payee.

LEGALLY ENFORCEABLE DEBT

Hitenbhai Parekh Proprietor - Parekh Enterprises v. State of Gujarat [MANU/GJ/0508/2009 : 2009

(3) GLH 742] has elaborately explained Section 20 of the N.I. Act. "9.1 Any material alteration of a negotiable instrument, however, renders it void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless the alteration was made in order to carry out the common intention of the original parties. The provision to that effect contained in section 87 has to be read in harmony with section 20 which permits and authorizes the holder of a negotiable instrument to complete the instrument for any amount and renders the drawer liable to the holder in due course to the extent of the amount intended by the drawer to be

paid under such instrument. It is clear from plain reading of provisions of section 20 and 87 that the injunction, under the pain of invalidating a negotiable instrument, against alteration operates only after an inchoate instrument is completed or a complete instrument falls within the definition of negotiable instrument. Therefore, the legally permissible completion of an inchoate instrument cannot be construed as material alteration of a negotiable instrument.

10. The above analysis of the statutory provisions leads to the conclusion that, when a cheque bearing only signature of the drawer is delivered and received by a payee for the discharge, in whole or in part, of any debt or liability, there is an implied authority for the person receiving such cheque to complete it by filling the blanks and the amount having been filled up under such implied authority would be the amount intended by him to be paid thereunder. The focus in such cases would shift to the aspect of such amount being for the discharge, in whole or in part, of any legally enforceable debt or other liability. Therefore, even with the props of legal presumptions, the onus of proving legally enforceable debt or other liability for the discharge of which a cheque must have been drawn has to be discharged by the prosecution for bringing home the charge of dishonour of cheque. It may, however, be facetious to hold that a blank cheque, drawn by a person on an account maintained by him with a banker, for payment of any amount of

money to another person, by merely putting his signature on it, would not be a cheque in the first place, because of not being a bill of exchange as it did not contain direction to a certain person to pay a certain sum of money to or to the order of a certain person or to the bearer of the instrument. When the Negotiable Instruments Act expressly permits and authorizes by a substantive provision the completion of an inchoate instrument by section 20 with the safeguard provided in section 87, provisions of sections 5 and 6 defining bill of exchange and cheque have to be harmoniously read to mean that an instrument which was initially not a cheque falling within the definition of section 6 would become a cheque when it was completed by filling the blanks and its dishonour shall have all the legal consequences of dishonour of a cheque proper."

Hon'ble Apex Court in the case of Rangappa Vs. Sri Mohan reported in MANU/SC/0376/2010 : (2010) 11 SCC 441, wherein at paragraph-26 it is held as follows: "26. In light of these extracts, we are in agreement with the respondent claimant that the presumption mandated by Section 139 of the Act does indeed include the existence of a legally enforceable debt or liability. To that extent, the impugned observations in Krishna Janardhan Bhat may not be correct. However, this does not in any way cast doubt on the correctness of the decision in that case since it was based on the specific facts and circumstance

therein. As noted in the citations, this is of course in the nature of a rebuttable presumption and it is open to the accused to raise a defence wherein the existence of a legally enforceable debt or liability can be contested. However, there can be no doubt that there is an initial presumption which favours the complainant."

Supreme Court in the case T.P. MURUGAN (DEAD) THR. LRS. vs. BHOJAN reported in MANU/SC/0795/2018 : (2018) 8 SCC 469 has held as under:-

"21. We have heard Senior Counsel for both parties, and perused the record. Under Section 139 of the N.I. Act, once a cheque has been signed and issued in favour of the holder, there is statutory presumption that it is issued in discharge of a legally enforceable debt or liability. This presumption is a rebuttable one, if the issuer of the cheque is able to discharge the burden that it was issued for some other purpose like security for a loan.

22. In the present case, the respondent has failed to produce any credible evidence to rebut the statutory presumption. This would be evident from the following circumstances:-

22.1 The respondent-accused issued a Pronote for the amount covered by the cheques, which clearly states that it was being issued for a loan;

22.2 The defence of the respondent that he had allegedly issued 10 blank cheques in 1995 for

repayment of a loan, has been disbelieved both by the Trial Court and Sessions Court, on the ground that the respondent did not ask for return of the cheques for a period of seven years from 1995. This defence was obviously a cover-up, and lacked credibility, and hence was rightly discarded.

22.3 The letter dated 09.11.2002 was addressed by the respondent after he had issued two cheques on 07.08.2002 for Rs. 37,00,000/- and Rs. 14,00,000/- knowing fully well that he did not have sufficient funds in his account. The letter dated 09.11.2002 was an after-thought, and was written to evade liability. This defence also lacked credibility, as the appellants had never asked for return of the alleged cheques for seven years.

22.4 The defence of the respondent that the Pronote dated 07.08.2002 signed by him, was allegedly filled by one Mahesh-DW. 2, an employee of N.R.R. Finances, was rejected as being false. DW. 2 himself admitted in his cross-examination, that he did not file any document to prove that he was employed in N.R.R. Finances. On the contrary, the appellants - complainants produced PW. 2 and PW. 4, Directors of N.R.R. Finances Investment Pvt. Ltd., and PW. 3, a Member of N.R.R. Chit funds, who deposed that DW. 2 was never employed in N.R.R. Finances.

23. The appellants have proved their case by overwhelming evidence to establish that the two cheques were issued towards the discharge of an existing liability and legally enforceable debt. The respondent

having admitted that the cheques and Pronote were signed by him, the presumption under S. 139 would operate. The respondent failed to rebut the presumption by adducing any cogent or credible evidence. Hence, his defence is rejected.

24. In view of the aforesaid facts and circumstances, the impugned order dated 27.09.2013 passed in Criminal Revision Petition Nos. 1657 and 1658 of 2008 is hereby set aside, and the order of Conviction and Fine passed by the Trial Court is restored."

Gorantla Venkateswara Rao vs. Kolla Veera Raghava Rao and Ors. : MANU/AP/0865/2005 - 2006 (1) RCR (Criminal) 637 - The mere loss of the demand promissory note or its non-production by itself would not be sufficient to hold that there was no legally enforceable debt. There are no other probable circumstances placed by the accused in the process of discharge of his burden. The failure of the accused in giving reply to the legal notice issued by P.W. 1 is one of the strong circumstances to draw an inference that the accused borrowed the amount from P.W. 1 and the cheque was issued towards part payment of the legally enforceable debt.

Andhra Pradesh High Court in the case of Nagisetty Nagaiah v. State of Andhra Pradesh and Anr. MANU/AP/0838/2004 wherein the said Court has observed that in the absence of furnishing of proper records as to filing of income tax returns and audit

book to construe that there was a legally enforceable debt, it cannot be said that the factual basis for raising a presumption had been established and rather, it is to be construed as the complainant failed to discharge his initial burden that there was a legally enforceable debt.

C.N. Dinesha vs. C.G. Mallika : MANU/KA/0730

/2017 - Coming to the contention that since the alleged loan transaction was not by way of cash, it is violative of Section 269SS punishable under Section 271D of the I.T. Act It is clear from the above that the loanee, who receives loan amount by way of cash above Rs. 20,000/- is liable to be penalized. There is no corresponding provision under the N.I. Act, which would vitiate the entire loan transaction for dealing with cash amount above Rs. 20,000/-. The culpability of offence under Section 138 of the Act will not freeze for the reason of violation of Section 269SS of the I.T. Act and nothing prevents the operation of the statutory presumption under Sections 118 and 139 of the Act. The accused in his attempt to dislodge the initial presumption arising out of the evidence of complainant produced the order sheet pertaining to the proceedings under Section 13-B of the Hindu Marriage Act filed by the complainant and her husband and also the copy of the joint petition filed therein. The petition for divorce by mutual consent was filed on 30.5.2005 and it was disposed of on 12.9.2006, since the complainant was not willing for

divorce by mutual consent. A cheque said to have been issued by the accused in respect of a chit transaction allegedly along with that of the cheque in question in this case was also placed by him. But this piece of evidence fail to choke the presumption flowing in favour of holder of the cheque after initial burden was discharged by the complainant by her evidence. The eventuality was, statutory presumption under Section 118(a) of the Act that cheque was issued towards consideration received and next presumption under Section 139 of the Act that there existed a legally enforceable debt came into play.

Rakesh Agarwal vs. K. Narasimha Rao and Ors.
2016 (1) ALT (CrI.) 136 (A.P.) : MANU/AP/2852

/2014 - The very case of the complainant is that it is a pronote debt dated 01.08.1994 for an amount of ` 35,000/- with interest for which the accused issued Ex. P-1 cheque for ` 50,000/- on 16.09.1997. It is not even the case either in the complaint or in his statement on oath in proof of the complaint to take cognizance in the proceedings under Section 200 Cr.P.C that there exists any acknowledgement of the alleged pronote debt in the meanwhile. The so called pronote if at all executed and not discharged, it was not filed though it is one of the material documents with no expression for its withholding to draw adverse inference against the complainant, as held by the Apex Court in Narayan Menon (supra) from non production of account books and withholding of

material documents in proof of the claim. Apart from it, from the very showing as per the complaint, the pronote debt even taken from the very claim dated 01.08.1994 is barred by time by 02.08.1997 and the cheque said to have been obtained if not issued from the controversy in this regard supra, was dated 16.09.1997 which is beyond the prescribed period of limitation for its enforceability from the said pronote debt which is payable as and when demanded to commence the limitation from date of pronote. Once the pronote debt is barred by time and there is nothing to say within the meaning of Section 25 of the Indian Contract Act of the cheque issued is by acknowledgement of the time barred debt to enforce the liability to bring within the meaning of legal enforceability as per the explanation of Section 138 of the Act, there is no legally enforceable debt. Once there is no legally enforceable debt from the very showing by the complainant, without any further proof by the accused, no offence could be made out under Section 138 of the Act against the accused, without going into other merits of the matter.

DIFFERENCE IN CHEQUE AND BILL OF EXCHANGE

Nikhil P Gandhi vs. State of Gujarat and Ors.:
MANU/GJ/0882/2016 - (2016) 4 GLR 2838 The key

differences between a cheque and a bill of exchange are as under:

- (1) An instrument used to make payments, that can be simply transferred by hand delivery is known as cheque. An acknowledgment prepared by the creditor to show the indebtedness of the debtor who accepts it for payment is known as a bill of exchange.
- (2) A Cheque is defined in section 6 while Bill of Exchange is defined in section 5 of the Negotiable Instrument Act, 1881.
- (3) The drawer and payee are always different in case of cheque. In general, drawer and payee are the same persons in case of bill of exchange.
- (4) The stamp is not required in cheque. Conversely, a bill of exchange must be stamped.
- (5) A cheque is payable to the bearer on demand. As opposed to bill of exchange, it cannot be made payable to the bearer on demand.
- (6) Cheque can be crossed but a Bill of Exchange cannot be crossed.
- (7) There is no days of grace allowed in cheque, as the amount is paid at the time of presentment of cheque. 3 days of grace are allowed in bill of Exchange.
- (8) A cheque does not need acceptance whereas a bill requires to be accepted by the drawee.

SECTION 20 NOT APPLIES TO CHEQUE

**S. Gopal vs. D. Balachandran 2008 (2) RCR (Civil)
581 : MANU/TN/0119/2008**

- A bare reading of Section 20 of the Negotiable Instruments act would go to show that it would apply to only a stamped instrument viz., pronote and bill of exchange and not to the cheques. As per Section 20 of the Negotiable Instruments Act, the holder in due course has every authority to complete the blank pronote and bill of exchange delivered to him after properly signing therein by the maker of the instrument. But, Section 20 will have no application to the blank cheques issued after signing by the drawer.

7. This Court in *Rajendran v. Usharani* MANU/TN/0919/2000 : 2001 LW (CrL.) 319 has observed that no law prescribes that in case of any negotiable instrument, the entire body of the instrument shall be written only by the marker or drawer of the instrument. Once the execution is admitted, it shall be taken that the cheque was issued by the accused in favour of the complainant towards the discharge of the liability even in a case where the cheque was filled up by some other person.

8. It is to be noted that there is no reference to Section 20 of the Negotiable Instruments Act in the aforesaid authority. A general proposition has been made to the effect that there is a presumption, in case a signed cheque is delivered to the payee, that the cheque so issued by the drawer in favour of the payee is only towards the discharge of his subsisting liability.

9. The aforesaid authority does not run counter to the provision under Section 20 of the Negotiable Instruments Act. As rightly observed therein, there is no law which prescribes that a cheque shall be filled up by the drawer himself. If such proposition is accepted, no unlettered person, who knows only to sign his name, can ever be a drawer of a cheque. Further, a person who is physically incapacitated to fill up the cheque cannot also draw a cheque and negotiate it. Of course, as far as the other negotiable instruments viz., promotes and bills of exchange, there is a clear mandate under Section 20 of the Negotiable Instruments Act to the effect that such an instrument can be negotiated by the maker thereof by simply signing and delivering the same to the holder in due course giving thereby ample authority to the latter to fill up the content of the instrument as intended by the maker thereof.

10. Even in case of a cheque, as there is no clear provision in the Negotiable Instruments Act, in the light of the above discussion, the court finds that if a drawer of a cheque gives authority to the payee or holder in due course or a stranger for that matter to fill up the cheque signed by him, such an instrument also is valid in the eye of law. There is no bar for the drawer of a cheque to give authority to a third person to fill up the cheque signed by him for the purpose of negotiating the same.....

In a case where the signature of the cheque was in dispute in a prosecution under Section 138 of the

Negotiable Instruments Act, the Honourable Supreme Court has observed that denial of an opportunity to the accused seeking to send the disputed cheque for examination and opinion of handwriting expert would amount to unfair trial and deprivation of an opportunity to the accused to rebut the claim of the complainant. The aforesaid ratio cannot be extended to the facts and circumstances of this case where the signature in the disputed cheque was candidly admitted by the accused.

12. Court has also held in *P.R. Ramakrishnan v. P. Govindarajan* (2007) 1 MLJ (Crl.) 1297 that when the accused disputes his signature in the cheque in question in a proceeding under Section 138 of the Negotiable Instruments Act, the court has to afford an opportunity to the accused to obtain an expert's opinion as to the genuineness or otherwise of the signature found therein. The above ratio will not apply to a case where a cheque admittedly signed by the drawer is sought to be analysed by an expert for opinion as to the age of the ink used in the cheque.

13. In *Yash Pal v. Kartar Singh* MANU/PH/0774/2003 it has been observed that the age of the ink cannot be determined on the basis of the writing if the ink in dispute was manufactured five years prior to the date of execution of the document and used effectively on a particular date for the first time and an expert's opinion as to the age of ink will not resolve any controversy, but, it will help to create only confusion.

14. As rightly observed by the Punjab and Haryana High Court in the ratio referred to above, if an old ink is used by the person, who assisted the drawer who had already put his signature in the cheque, to fill up the matter, no useful purpose will be served if such a cheque is analysed by the expert for rendering an opinion.

15. It is found that the age of the ink cannot be determined by an expert with scientific accuracy. Further, the use of old ink manufactured long ago will definitely create a dent in the opinion furnished by an expert. Therefore, there is no necessity for sending the disputed cheque admittedly signed by the petitioner to an expert for his opinion.

FILLING OF BLANK SIGNED CHEQUE IS NOT MATERIAL ALTERATION

Delhi High Court in Ravi Chopra Vs. State & Anr. reported in MANU/DE/0448/2008 : 2008 (102)

DRJ 14714. The word "cheque" has been inclusively defined under Section 6 NI Act to include a 'bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand...'. The words "bill of exchange" have been defined in Section 5 NI Act as "an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument." The

expression 'negotiable instrument' has been defined in Section 13 NI Act as meaning a "promissory note, bill of exchange or cheque payable either to order or to bearer."

15. What appears to be clear from the above definitions that an essential feature of a cheque is that it has to be signed by the maker. This signing of the cheque need not be by hand alone. After the amendment to Section 6 in 2002, the NI Act acknowledges that there can be an electronic cheque which can be "generated, written and signed in a secure system." Nevertheless, the signing of the cheque is indeed an essential feature. But what about the other material particulars? Can the word "cheque" occurring in Section 138 NI Act include a blank cheque which is signed by the drawer but the material particulars of which are left unfilled at the time it was handed over to the payee? While on the one hand Section 138 NI Act which contemplates a 'no fault liability' has to be strictly construed as regard the basic ingredients which have to be shown to exist, it requires examination of the other provisions of the NI Act in order to ascertain if a cheque that was signed but left blank can, if the material particulars are subsequently filled up and presented for payment, still attract the same liability.

16. The counsel for the petitioner contended that a cheque which is signed but left blank at the time of such signing, will be materially altered if it is subsequently filled up without the consent of the

drawer, which according to him is what has happened in the present case. Such cheque would be void in terms of Section 87 of the NI Act and Therefore cannot be presented for payment or honoured even if it is. Section 87 NI Act reads as under:

Section 87 - Effect of material alteration Any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties; Alteration by indorsee.--And any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof. The provisions of this section are subject to those of Sections 20, 49, 86 and 125.

17. While it is correct that in terms of the above provision, any material alteration to a cheque without the consent of the drawer unless it is made to carry out the common intention of the original parties thereto renders the cheque void, the expression "material alteration" has not been defined. Significantly, Section 87 has been made subject to Sections 20, 49, 86 and 125 NI Act. These provisions help us to understand what are not considered 'material alterations' for the purpose of Section 87.

18. Section 20 NI Act talks of "inchoate stamped instruments" and states that if a person signs and delivers a paper stamped in accordance with the law and "either wholly blank or have written thereon an

incomplete negotiable instrument" such person thereby gives prima facie authority to the holder thereof "to make or complete as the case may be upon it, a negotiable instrument for any amount specified therein and not exceeding the amount covered by the stamp." Section 49 permits the holder of a negotiable instrument endorsed in blank to fill up the said instrument "by writing upon the endorsement, a direction to pay any other person as endorsee and to complete the endorsement into a blank cheque, it makes it clear that by doing that the holder does not thereby incurred the responsibility of an endorser." Likewise Section 86 states that where the holder acquiesces in a qualified acceptance, or one limited to part of the sum mentioned in the bill, or which substitutes a different place or time for payment, or which, where the drawees are not partners, is not signed by all the drawees, all previous parties whose consent has not been obtained to such acceptance would stand discharged as against the holder and those claiming under him, unless on notice given by the holder they assent to such acceptance. Section 125 NI Act permits the holder of an uncrossed cheque to cross it and that would not render the cheque invalid for the purposes of presentation for payment. These provisions indicate that under the scheme of the NI Act an incomplete cheque which is subsequently filled up as to the name, date and amount is not rendered void only because it was so

done after the cheque was signed and delivered to the holder in due course.

19. The above provisions have to be read together with Section 118 NI Act which sets out various presumptions as to negotiable instruments. The presumption is of consideration, as to date, as to time of acceptance, as to transfer, as to endorsement, as to stamp. The only exception to this is provided in proviso to Section 118 which reads as under:

Provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

20. A collective reading of the above provisions shows that even under the scheme of the NI Act it is possible for the drawer of a cheque to give a blank cheque signed by him to the payee and consent either impliedly or expressly to the said cheque being filled up at a subsequent point in time and presented for payment by the drawee. There is no provision in the NI Act which either defines the difference in the handwriting or the ink pertaining to the material particulars filled up in comparison with the signature thereon as Constituting a 'material alteration' for the purposes of Section 87 NI Act. What however is essential is that the cheque must have been signed by the drawer. If the signature is altered or does not tally

with the normal signature of the maker, that would be a material alteration. Therefore as long as the cheque has been signed by the drawer, the fact that the ink in which the name and figures are written or the date is filled up is different from the ink of the signature is not a material alteration for the purposes of Section 87 NI Act.

25. In other words, merely because there is a CFSL report that shows that the handwriting, the ink and the time of filling the material particulars is different from that of the signatures, that by itself will not go to prove that the accused has discharged his liability towards the complainant even before the date of the presentation of the cheques. For these reasons, there is no merit in the prayer of the petitioner for sending the cheques to the CFSL for the opinion of the handwriting expert.

HOLDER SHOULD EXPLAIN MATERIAL ALTERATION

Andhra Pradesh High Court in Allampatti Subba Reddy Vs. Neelapareddi (MANU/AP/0146/1966 : AIR 1966 A.P. 267), which runs as under:

(5) The law on the point seems to me to be clear. The English rule that a material alteration of a date makes it altogether void is summarised thus in Halsbury's Law's of England, III Edition, Vol.11, p.367, Paras.598 and 599:- 598. A writing proposed to be executed as a deed may be altered by erasure or interlineation or in

any other way before it is so executed, and any alteration so made before execution does not affect the validity of the deed. Any alteration, erasure or interlineation appearing upon the face of a deed is presumed, in the absence of evidence to the contrary, to have been made before the execution of the deed. 599. If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance, however, is not ab initio, or so as to nullify any conveyancing effect which the deed has already had; but only operates as from the time of such alteration, and so as to prevent the person, who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound thereby, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made.

(6) The law is not otherwise in India. The above said rule is quoted with approval in several Indian decisions. Section 87 of the Negotiable Instrument Acts statutorily adopts the said rule. Section 87 is so far as it is relevant is in the following terms:- Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does

not consent thereto, unless it was made in order to carry out the common intention of the original parties;

It must be remembered that it is not any and every alteration that avoids the instrument. To have that effect the alteration must be in a material particular. A material alteration can be brought about by change of date or time of drawing or of the place of payment or by change in the sum payable, etc., etc. It is thus evident that the date of a promissory note is a material portion of it, and any alteration of such date will naturally void the promissory note, unless, of course, as stated in the Section such an alteration is made with the consent of the other party, or is made to effectuate the common intention of the original parties. It is wrong to assume that the date of the promissory note is merely a description. It indicates the time when the promissory note was executed. In most cases the date is very material in calculating the date of the performance of the contract and more often fixing the period of limitation within which the plaintiff will have to institute the suit on the foot of such promissory note. It is immaterial whether the alteration is made in the date or month or year. Any such alteration being material must necessarily result in the avoidance of the promissory note.

(7) It is true that in two cases alterations, though material, do not vitiate the instrument; firstly, when the alteration is made before the promissory note is executed, and secondly, if the alteration made was merely to correct a mistake, or to make it what it was

originally intended to be. As stated earlier, the Section (S. 87) itself states that the alteration can be made with the consent of the parties, or to carry out the common intention of the original parties. Any mistake occurring before the execution of the promissory note can, however, always be corrected before the document is actually executed.

(8) The general rule in English law followed in India is that a party having custody or control of a document produced in evidence must explain the alteration. When the instrument on its production appears to have been altered, it is a general rule that the party offering it in evidence must explain its appearance, because every alteration in the case of a negotiable instrument renders it suspicious. It is only reasonable that the party claiming under it should remove the suspicion. It is true that it is not on every occasion that a party tendering an instrument in evidence is bound to explain any material alteration that appears upon its face. He must, however, explain when he is seeking to enforce it. It is plain that when the alteration appears to have been made contemporaneously with the document, or if it is made at some subsequent period with the privity of the parties charged and there is no fraud, it does not affect the validity of the instrument.

Jayanthilal Goel Vs. TMT. Zubeda Khanum (MANU/AP/0099/1986 : AIR 1986 A.P. 120), by holding that it is the duty of the holder of the

negotiable instrument to explain to the Court that the instrument is not subjected to material alteration because the instrument is forthcoming from the possession of the plaintiff. There is no conflict of views with regard to enforceability of negotiable instruments in a Court of law, which were subjected to material alteration, in a suit based on promissory note.

A. Thirumoorthy vs. S. Bastin: MANU/TN/2620/2014 : (2015) 1 MLJ 335 - 23. A negotiable instrument, afflicted with the disease of material alteration is a void instrument. A void instrument/document cannot be enforced in a Court of law. Promissory note, which is having material alteration, thus cannot be enforced in a Court of law. In such an event, the suit must fail.

24. Now, in the instant case, there is specific plea in the written statement that there is material alteration in the suit promissory note. Material alteration is a mixed question of fact and law. The law relating to material alteration vide Section 87 of the Negotiable Instruments Act could be applied only when it was factually established.....

28. It is pertinent to note that Ex.A.1 came from the possession of plaintiff. It is he who has to explain about the alterations in Ex.A.1. Whereas he has not even mumbled about it in his chief examination. One thing is clear. Men will lie. But not the documents. Live human beings utter lies to the extent possible,

but not the documents and dead bodies. They will always tell the truth. Truth, as it is. False, as it is. ...

31. There is alteration as to the year in Ex.A.1, whether it is for the benefit of the plaintiff or not it does not matter, when question of law comes, right from Privy Counsel upto today, the plight of such an instrument is that it is void. Such an instrument cannot be enforced in a Court of law. A Court of law cannot be a venue to enforce void documents. An invalid document cannot be validated in a Court of law. This is the tenor of the said decisions on Section 87 of the Negotiable Instruments Act.

INGREDIENTS OF CHEQUE BOUNCE CASE

The Hon'ble Supreme Court in the case of **Kusum Ingots & Alloys Ltd. vs. Pennar Peterson Securities Ltd. And Others; MANU/SC/0127/2000 : (2000) 2 SCC 745** has laid down the following ingredients for taking cognizance under Section 138 of the NI Act:-

- " (i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;
- (ii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn of within the period of its validity whichever is earlier;
- (iii) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit

of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(iv) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(v) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice;"

In order to constitute an offence under Section 138 of the N.I. Act, this Court, in **Jugesh Sehgal vs. Shamsher Singh Gogi, (2009) 14 SCC 683**, noted the following ingredients which are required to be fulfilled:

“(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account;

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.”

CHEQUE BOUNCE CASE GUIDELINES AS LAW ISSUED BY SUPREME COURT:-

Justice K.G. Balakrishnan, Justice P. Sathasivam, Justice J.M. Panchal of Supreme Court of India, in case of Damodar S. Prabhu vs. Sayed Babalal H. Reported in (2010) 5 SCC 663. In paragraph 4, Supreme Court held that the dishonour of a cheque can be best described as a regulatory offence which

has been created to serve the public interest in ensuring the reliability of these instruments and the Court has further held that the impact of the offence is confined to private parties involvement in commercial transactions. The Court also noted the situation that large number of cases involving dishonour of cheques are choking the criminal justice system and putting an unprecedented strain on the judicial functioning. In paragraph 7 of the judgment this Court noted the submissions of the learned Attorney General to the extent that the Court should frame certain guidelines so as to motivate the litigants from seeking compounding of the offence at an early stage of litigation and not at an unduly late stage. It was argued that if compounding is early the pendency of arrears can be tackled. In paragraph 12 the Court dealt with the provision of Section 147 of the N.I. Act and held that the same is an enabling provision for compounding of the offence and is an exception to the general rule incorporated in sub- section 9 of Section 320 of the Code. This Court harmonised the provision of Section 320 of the Code along with Section 147 of N.I. Act by saying that an offence which is not otherwise compoundable in view of the provisions of Section 320 sub-section 9 of the Code has become compoundable in view of Section 147 of N.I. Act and to that extent Section 147 of N.I. Act will override Section 320 sub-section 9 of the Code since Section 147 of N.I. Act carries a non- obstante clause. This Court on the basis of the submissions of the learned

Attorney General framed certain **guidelines for compounding of offence** under Section 138 of the N.I. Act. Those guidelines are as follows:

“THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the writ of summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.

(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.

In para 16 following directions issued:- It should be mandatory for the complainant to disclose that no other complaint has been filed in any other court in respect of the same transaction. Such a disclosure should be made on a sworn affidavit which should accompany the complaint filed under Section 200 of the CrPC. If it is found that such multiple complaints have been filed, orders for transfer of the complaint to the first court should be given, generally speaking, by the High Court after imposing heavy costs on the complainant for resorting to such a practice. These directions should be given effect prospectively.

Hence Hon'ble Apex Court formulated the following judicial **guidelines for composition of the offence** under the Act:-

- (i) If the accused made an application for compounding of offences at first or second hearing of the case then compounding may be allowed by the Court without imposing any costs on the accused.
- (ii) If application is made before Magistrate at a subsequent stage, accused will be required to pay 10% of the cheque amount by way of costs.
- (iii) If application is made before Sessions Court or High Court in revision or appeal compounding may be allowed on payment of 15% of the cheque amount.
- (iv) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.
- (v) The competent Court can of course reduce the costs with regard to the specific facts and circumstances of

a case, while recording reasons in writing for such variance.

(vi) Any costs imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the Court before which compounding takes place.

VICARIOUS LIABILITY

In S.K. Alagh vs. State of Uttar Pradesh and Others, (2008) 5 SCC 662, Court held: 19. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a Company or an employee cannot be held to be vicariously liable for any offence committed by the Company itself. (See Sabitha Ramamurthy v. R.B.S. Channabasavaradhya, (2006) 10 SCC 581)”

In Sham Sunder and Others vs. State of Haryana, (1989) 4 SCC 630, Court held as under: “9. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not.”

S.M.S. Pharmaceuticals Ltd. VS Neeta Bhalla and anr. AIR 2005 SC 3512, Necessary averments ought

to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section 141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable. Section 141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section 141 of the Act has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Sections 141 of the Act, he would issue the process. Merely being described as a director in a company is not sufficient to satisfy the requirement of Sections 141 of the Act. Even a non director can be liable under Section 141 of the Act. The averments in the compliant would also serve the purpose that the person sought to be made liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

SAROJ KUMAR PODDAR VS STATE (NCT OF DELHI) & ANR AIR 2007 SC 912. Allowing the appeal, the Court HELD:

1. A person would be vicariously liable for commission of an offence on the part of a Company only in the event the conditions precedent laid down therefor in Section 141 of the Act stand satisfied.
2. Apart from the Company and the appellant, the Managing Director and all other Directors were also made accused. The appellant did not issue any cheque. He had resigned from the directorship of the Company. It may be true that as to exactly on what date the resignation was accepted by the Company is not known, but, even otherwise, there is no averment in the complaint petitions as to how and in what manner the appellant was responsible for the conduct of the business of the Company or otherwise responsible to it in regard to its functioning. He had not issued any cheque. How he is responsible for dishonour of the cheque has not been stated. The allegations so made, thus, do not satisfy the requirements of Section 141 of the Act.
3. Allegations to satisfy the requirements of Section 138 of the Act might have been made in the complaint petition but the same principally relate to the purported offence made by the Company. With a view to make a Director of a Company vicariously liable for the acts of the Company, it was obligatory on the part of the complainant to make specific allegations as are required in law.
4. The allegations made in the complaint petitions even if are taken to be correct in their entirety do not disclose any offence as against the appellant. The

proceedings against him, thus, should have been quashed by the High Court. The impugned judgment, therefore, cannot be sustained which is set aside accordingly.

In DCM Financial Services Limited Vs. J.N. Sareen & Another, MANU/SC/7699/2008 : 2008 (3) RCR

(Crl.) 152, post-dated cheques were issued by the Company known as M/s. International Agro Allied Products Limited. The first respondent before the Hon'ble Supreme Court resigned from the Directorship of the Company on 25th of May, 1996. One of the post-dated cheques, which was issued in April, 1995, i.e., before he resigned from the Directorship of the Company was dated 28.1.1998. The cheque when presented in the Bank for encashment was dishonoured. The payment to the complainant was not made despite issue of Notice of Demand by it. The complaint against the first respondent before the Hon'ble Supreme Court was based on the allegation that he was the person in charge and responsible to the Company at the time when the offence was committed. It was also alleged that the offence had been committed by the Company with the consent and connivance of accused Nos. 2 to 10, which included respondent No. 1 before the Hon'ble Supreme Court. He filed an application seeking discharge, relying upon Form No. 32 issued by Registrar of Companies in support of his contention that he had resigned as a Director of the Company

much prior to dishonour of the cheque in question. The learned Additional Sessions Judge took note of Form No. 32 and also noted that the complainant had not filed any affidavit to the effect that it had verified from the Registrar of Companies and Form No. 32 filed by the accused was not genuine. A Criminal Revision Petition filed against the order of the learned Additional Sessions Judge was dismissed by the High Court. Relying upon its earlier decisions in the case of "K. Srikanth Singh Vs. M/s. North East Securities Limited & Another", MANU/SC/3153/2007 : 2007 (3) RCR (Criminal) 934 : 207 (4) RAJ 226 : JT 2007 (9) SC 449, the Hon'ble Supreme Court observed as under: "Section 141 of the Act provides for a constructive liability. A legal fiction has been created thereby. The statute being a penal one, should receive strict construction. It requires strict compliance of the provision. Specific averments in the complaint petition so as to satisfy the requirements of Section 141 of the Act are imperative. Mere fact that at one point of time some role has been played by the accused may not by itself be sufficient to attract the constructive liability under Section 141 of the Act."

12. In the case before the Hon'ble Supreme Court, the respondent No. 1 had resigned from the Directorship of the Company under intimation to the complainant and, in these circumstances, the Hon'ble Supreme Court was of the view that a person who had resigned with the knowledge of the complainant in the year 1996, could not be a person in charge of the Company

in the year 1999 when the cheque was dishonoured as he had no say in the matter that the cheque is honoured and he could not have asked the Company to pay the amount. In my view even if resignation was not given by the petitioner under intimation to the complainant, that would not make any difference, once the Court relying upon certified copy of Form 32 accepts his plea that he was not a director of the Company, on the date the offence under Section 138 of Negotiable Instruments Act was committed. He having resigned from the directorship much prior to even presentation of the cheque for encashment, he cannot be vicariously liable for the offence committed by the Company, unless it is alleged and shown that even after resigning from directorship, he continued to control the affairs of the company and therefore continued to be person in charge of and responsible to the company for the conduct of its business.

13. It was also contended by the learned counsel for the complainant/respondent that the petitioner being the signatory of cheque, in question, he was its drawer within the meaning of Section 138 of Negotiable Instruments Act. In my view, the contention is totally misconceived. The cheque was issued by the Company and not by the petitioner. He only signed the cheque on behalf of the Company. He does not become a drawer of the cheque merely by signing it on behalf of the company when the cheque is issued by the company in discharge of its debt or liability and is not signed by him in his personal capacity. If the

contention of the learned counsel for the complainant/respondent is accepted, even an employee of the Company, who on account of his being, an authorized signatory signs a cheque issued by the Company towards discharge of the debt or other liability of the Company, would be liable to prosecution and conviction under Section 138 of Negotiable Instruments Act even after he resigns from the company and is no more in its employment. This certainly could not have been the intention of the legislature. Even the vicarious liability created under Section 138 of Negotiable Instruments Act would not be attracted in respect of a Director or an employee of the Company who resigns and severs his connections with the company, unless the complainant is able to bring his case within the purview of sub-section 2 of Section 141 of Negotiable Instruments Act, by proving that the offence had been committed with his consent or connivance or was otherwise attributable to any neglect on his part."

SUIT FOR MONEY RECOVERY BASED ON PRONOTE

Allahabad High Court in Bhaggu v. Manni Prasad reported in MANU/UP/0059/1965 : AIR 1965 Allahabad 202, has held that the Court is not precluded from coming to its own conclusions in cases where it is fully familiar with the language and script of the document which is the subject matter of

scrutiny before it and where it has the assistance in such scrutiny of the counsel of the parties. If on the face of it the court is able to come to a conclusion that a particular document contains alterations and interpolations it is not bound to seek the assistance of Handwriting Experts. It could not, therefore, be said that simply because a Handwriting Expert was not called to give evidence, the Court is not empowered to come to a conclusion whether the pronote and the receipt in question have been subjected to alterations or interpolations. The learned Single Judge has held as under: "(7) It may be a rule of caution and prudence that where the Court considers that the opinion of a Handwriting Expert would be of assistance to it in coming to a decision it may call for the evidence of an expert. But there is no rule of law that the Court is precluded from coming to its own conclusions in cases where it is fully familiar with the language and script of the document which is the subject matter of scrutiny before it and where it has the assistance in such scrutiny of the counsel of the parties. If on the face of it the court is able to come to a conclusion that a particular document contains alterations and interpolations it is not bound to seek the assistance of Handwriting Experts. It could not, therefore, be said that simply because a Handwriting Expert was not called to give evidence, the Court is not empowered to come to a conclusion whether the pronote and the receipt in question have been subjected to alterations or interpolations"

Duggineni Seshagiri Rao vs. Kothapalli Venkateswara Rao: MANU/AP/0879/2001, 2001

(6) ALT 95 - Even if one looks to the definition of the 'promissory note' under Section 4, one would find that the requirements for making an instrument a promissory note do not contain the requirement of naming a person, it can be given in favour of a certain person or to bearer of the instrument. That makes it clear that, one who is holding the document is the person who derives rights out of that instrument. In other words, it would mean that the document with first three requirements as stated above, should be delivered to the payee, once it is delivered it becomes a promissory note. Name and other particulars can be filled up even at a later stage. When one reads Section 4 in conjunction with Sections 20 and 42 this is the only interpretation that can be placed on the meaning of 'promissory note' under Section 4 of the Act. Section 20 lays down that when a person signs and delivers to another person a paper stamped in accordance with law relating to negotiable instrument it becomes a negotiable instrument even if it is wholly blank or written with incomplete particulars. Similarly Section 42 even recognizes instrument issued in the name of fictitious person to be a valid instrument. Although Section 42 relates to bills but it also accepts that an acceptor of a bill of exchange even if it was drawn in a fictitious name it would create a genuine claim in

favour of the holder. Therefore, even if a negotiable instrument is incomplete it would be a legal instrument provided it satisfies the first three conditions.

Madras High Court in Sesharal Bafna v. Subramanian, MANU/TN/0353/1983 : AIR 1983

Mad 368 , held that the payee can fill up the blank instrument before its presentation and if at the time of presentation the document is complete then it would be a legal instrument. The Court held that, where a hand-note does not mention the name of the payee at all no decree can be passed on the instrument, but the payee can fill up the blank instrument and unless he does so he is not entitled to bring a suit and obtain a decree. This is an unusual suit filed by the plaintiff on a blank promissory note without the date of the promissory note and the name of the promisee. However, even when the name of the promisee is not found in the negotiable instrument, the plaintiff has chosen to file the suit on the promissory note in his own name. In other words, it is very important to note that the suit is not based on the original cause of action, but only on the promissory note purporting to bear the date 25-11-1976. It is strenuously contended on behalf of the defendants that suit on a blank promissory note without the particulars of date and the promisee is not a negotiable instrument in the eye of law, and, therefore, the suit itself is not maintainable. Section 13 of the Negotiable

Instruments Act defines a negotiable instrument. S. 87 deals with material alteration on a negotiable instrument and it runs thus- "Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto unless it was made in order to carry out the common intention of the original parties :". Section 20 deals with inchoate stamped instruments. Therefore, the more important point for consideration is, whether the plaintiff is entitled to fill up the blanks long after filing of the suit. I have carefully considered this argument and I am of opinion that until the drawee's name is inserted before the filing of the suit the instrument is not a promissory note in the eye of law. In other words, unless the plaintiff or the holder exercised the authority under S. 20 of the Act and until it is filled up, it does not import a contract with him and he cannot recover the amount on the instrument. The English law on this subject is that the instrument must be filled up within a reasonable time and strictly in accordance with the authority given. When the holder does not exercise the authority in filling up the blanks, he cannot of course derive no benefit from it. In *Brijbhusan Pande v. Ramjanam Kuer*, AIR 1932 Pat 314, a single Judge has held that where the instrument does not mention the name of the payee at all, no decree can be passed on such instrument. It is, of course, stated therein that the payee can fill in the blank instrument and

unless he does so, he is not entitled to bring a suit and obtain a decree. In *Ramaswami Reddi v. K. Doraiswami Reddi* MANU/TN/0289/1957 : AIR1957Mad715 , a Division Bench of Madras High Court held that the remedy of the promise is to file a suit on the original cause of action and that he can treat the promissory note as a security or voucher.

In Indian Bank v. K. Nataraja Pillai and Anr. MANU/SC/0441/1993 : (1993)1SCC493 , Bench of two Judges was to consider whether for granting a short-term loan by the bank, further loan of Rs. 1,00,000 was sanctioned to cover up the deficiency for which promissory note was executed alongwith property hypothecated for short-term loans. It was contended that the sanction of Rs. 1,00,000 under the promissory note was towards discharge of the equitable mortgage and not for cash consideration and that therefore, it was not supported by consideration. It was held that the promissory note was fully supported by consideration and the presumption of passing of the consideration got attracted.

Perumal Chettiar vs. Kamakshi Ammal AIR 1938 Mad 785 : MANU/TN/0229/1938

39. The question for decision as formulated by my Lord is: Whether a person who has lent money on a promissory note can sue to recover the debt apart from the note when the note embodies the terms of the

contract with the borrowers but is inadmissible in evidence owing to a defect in the stamping.

40. My answer to this question is first that the existence of the debt is not a term of the contract, and even if it is recited in the promissory note it can be proved by other evidence; and secondly that the terms of the contract between the promisor and the promisee can never be wholly embodied in the promissory note. One of the terms of the contract is that the promisee agrees to accept the promissory note in satisfaction of the debt due to him by the promisor. What he agrees to accept is a valuable security and not a worthless piece of paper - which is all that the note is if it is not properly stamped. If then the note is valueless the promisor has not done that which he contracted to do. The promisee has not got what he bargained for. The promisor therefore is bound to restore to the promisee the advantage which he the promisor has obtained from the transaction. To me it appears that when a man gives another a promissory note in satisfaction of a debt or for other consideration he gives at the same time a warranty that the note is a good and enforceable instrument. If the note is bad for want of a proper stamp it is difficult to see how it can operate as a discharge of the debt any more than the giving of a counterfeit currency note could so operate. This implied warranty is in my opinion a term of the contract and such a warranty is in my experience not generally embodied in a promissory note or other negotiable instrument.

Mysore High Court in K. Anantharajaiah v. Shivaramaiah MANU/KA/0071/1968, AIR 1968

Kant 148 It was held by Gopivallabha Iyengar, J. That where a creditor lent a loan and had taken a receipt and a promissory note to evidence it, his claim for recovery of loan without producing the promissory note is not maintainable. But it is however pointed out by him, that, if the cause of action is antecedent to the making of promissory note, then there is nothing to prevent the creditor from maintaining a suit on the original cause of action founded on the loan..... It is undisputed that on that very day the defendant not merely executed a consideration receipt as mentioned in paragraph 1 of the plaint but also executed a promissory note. There is no reference to the promissory note in the plaint and it has been made clear by the plaintiff that the suit is based on the original cause of action and not on the basis of the promissory note executed on that day. The learned Munsiff held that the plaintiff had advanced a sum of Rs. 1,000 as a loan to the defendant but the loan and the execution of the promissory note were part of the same transaction. The learned Munsiff also states in his judgment that even the plaintiff has not deposed in his evidence that the amount borrowed is independent of the execution of the promissory note in his favour. In view of this. The learned Munsiff held that the plaintiff cannot fall back on the original cause of action. Therefore he dismissed the suit. On appeal the

learned Civil Judge came to the same conclusion. Referring to the evidence of P. W. 2, the learned Judge holds that the loan referred to by the plaintiff is contemporaneous with the execution of the promissory note and the consideration receipt and they form one transaction. Exhibit P--1 is the consideration receipt produced by the plaintiff. It recites that the defendant had received a sum of Rs. 1,000 being the amount due in respect of the promissory note executed on that day. This document clearly indicates that the payment of the amount referred to in it is made with reference to the promissory note executed by the defendant on that very day and thus there is clear indication that the loan referred to by the plaintiff is not separable from the promissory note, being in any manner antecedent to the document or otherwise a separate transaction. The learned Judge, therefore concurred with the finding of the trial Court that the advance of money and the execution of promissory note constituted one transaction and inseparable. This promissory note is insufficiently stamped and has not been put in evidence and the plaintiff has tried to by-pass the promissory note by basing the suit on the original cause of action. Admittedly the transaction is evidenced by writing which is inadmissible in evidence. The plaintiff's suit is dismissed as not maintainable by both the Courts. It is against this judgment and decree that the plaintiff has preferred this second appeal. High court confirmed

judgment and decree of the lower Courts and the appeal is dismissed.

LIABILITY OF HEIRS ON DEBT

MANU/BH/0045/1977 : AIR 1977 Pat 185 (Keshav Nandan Sahay and Others Vs. The Bank of Bihar), wherein it is held that, In a suit for realisation of debt decreed and when pending execution cases, father died, then the remedy of the decree holder as against ancestral property in the hands of sons lies in impleading them in execution cases and not by way of separate suit.

Modi Nathubhai Motilal and Others Vs. Chhotubhai Manibhai Desai reported in MANU/GJ/0046/1962 : AIR 1962 GUJ 68 (V 49 C 19), at page 76, wherein it is inter alia observed as follows :- A particular member of the family may agree to take the liability even if no such additional property is allotted to him over and above his legitimate share. Their Lordships of the supreme Court have also observed in *Sidheswar Mukharjee v. Bhuvneshwar Prasad* **MANU/SC/0089/1953 : AIR 1953 SC 487** that It is settled law that even after partition the sons could be made liable for the pre-partition debts of the father if there was no proper arrangement for the payment of such debts at the time when the partition was effected, although the father could have no longer any right of alienation in regard to separated shares of the sons. Their Lordships were, of course, dealing with the

liability of the sons. As already observed, the strict principle of pious obligation does not apply to the wife but the liability would be on the wife indirectly if at the time of the partition she has been allotted a share not in the property available for partition, but in the property which was not available for partition.

Laxmidhar Sahu Vs. Smt.Padmini Tripathy And Others reported in MANU/OR/0004/1991 : AIR 1991 Ori 9, wherein it is observed as follows:- Hindu widow being a statutory heir only, cannot be made personally liable for the liabilities of her husband. In case, the decree has made her personally liable allowing it to become final, she can make a grievance in the executing Court that she is not personally liable. If the decree has made her personally liable and she has challenged the same in appeal, appellate Court will set aside that portion of the decree. Where the decree did not specifically make the Hindu widow personally liable and she had not assailed the same, there was no bar for her to contest in the execution proceeding to the extent that she could not be personally liable since the decree had not made her so liable and attachment of her personal property could not be ordered.

In Sudhamani Dei Vs. Sadananda Mohanty and Another reported in MANU/OR/0035/1979 : AIR 1979 Ori 130 , it is held that the terra 'other descendant' in Section 53 of the code of Civil

Procedure does not include widow and in decree against the deceased husband in execution the share received by the widow is immune.

In Govindammal and Another Vs. Bhuvaneswari Financing Corporation reported in MANU/TN/

0683/2001 : AIR 2002 Mad 296, it is observed that

In a suit for recovery of amount filed against legal heirs of borrower, on basis of pronote, there is nothing to show that said heirs though related to maker, have inherited his estate, so as to become liable to repay the debts and as such suit is not maintainable. It is hereby made clear that even if the plaintiff had proved that the defendants were related to the late Ethirajulu Naidu so as to become the heirs of the deceased, it would not be sufficient unless they were able to further prove that the said Ethirajulu Naidu left a valuable estate and that estate has been inherited by these defendants and that estate was worth the money that is sought to be recovered and only in proof of all these aspects, the next step of lodging the claim against these appellants/defendants would be arrived at since the plaintiff has miserably failed to prove this vital aspect which is quite legal and prerequisite condition, the other question of the borrowing of Ethirajulu Naidu is quite irrelevant to the issue with which the defendants have absolutely no nexus or bearing.

S. M. Jakati & Another vs S. M. Borkar & Others
1959 AIR 282, 1959 SCR Supl. (1)1384

The liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All that results from partition is that the right of the father to make an alienation comes to an end.

WHAT IS MEANT BY ON DEMAND

Hon'ble Apex Court in Syndicate Bank vs. Channaveerappa Beleriant and others, reported in MANU/SC/2032/2006 : AIR 2006 SC 1874,

wherein the question of when do a guarantor's liability would arise under Sections 126, 128, 129 and 130 of Contract Act, had an occasion to analyse the word 'on demand'. At Paragraph-12 of its judgment, it was pleased to observe as below: " 12: We will examine the meaning of the words 'on demand'. As noticed above, the High Court was of the view that the words 'on demand' in law have a special meaning and when an agreement states that an amount is payable on demand, it implies that it is always payable, that is payable forthwith and a demand is not a condition precedent for the amount to become payable. The meaning attached to the expression 'on demand' as 'always payable' or 'payable forthwith without

demand' is not one of universal application. The said meaning applies only in certain circumstances. The said meaning is normally applied to promissory notes or bills of exchange payable on demand....."

IN ON DEMAND PRONOTE DEMAND NOTICE NECESSARY

Manjunath S. vs. B.K. Subbarao : MANU/KA/6502 /2019 - The above observation of the Hon'ble Apex Court (Syndicate Bank vs. Channaveerappa Beleriant and others, reported in MANU/SC/2032/2006 : AIR 2006 SC 1874) would go to show that in case of a promissory note, normally the word 'on demand' implies that it is always payable forthwith and demand is not a condition precedent for the amount to become payable. Admittedly, in the instant case, the Promissory Note at Ex. P-1 is an on demand Promissory Note. Further, as observed above, the plaintiff has failed to prove that before instituting the present suit, he had made any demand for the repayment of the amount under the Promissory Note from the defendant. Therefore, the present suit is filed without there being a demand by the promisee under an on demand Promissory Note which is at Ex. P-1.

CHEQUE SHOULD BE FOR EXISTING LIABILITY

Karnataka High Court in the case of **M/s. Shreyas Agro Services Pvt. Ltd. v. Chandrakumar : MANU/KA/8224/2006 : 2006 Criminal Law Journal 3140 : 2006 (3) KCCR 1779**, considered almost an identical issue which I am called upon to decide. A learned Single Judge of the High Court even considered the Supreme Court decision in *I.C.D.S. Limited* (supra). Considering the same, the learned Single Judge held in paras 3, 4 and 5 as under: "3. The very scheme of procedure adopted shows that the cheques are not issued in respect of any current existing ascertained liability. The words "for discharge of any debt or other liability" in Sec. 138 of N.I. Act should be interpreted to mean current existing or past ascertained liabilities. The cheque issued in respect of future liabilities not in existence as on the date of cheque would not attract prosecution u/s. 138 of N.I. Act.

4. The decision of the Supreme Court in *I.C.D.S. Ltd. v. Beena Shabeer*, MANU/SC/0669/2002 : ILR 2003 Kar 4373 : (AIR 2002 SC 3014) has no application to the facts of the present case. In the said case the cheque was issued by a guarantor. The Supreme Court while interpreting the words "discharge of any debt or liability" held that the liability of the guarantor would also come within the ambit of words "the other liability". In the instant case the issue is altogether different. The accused had issued a blank cheque not in respect of any current or ascertained liability but it was issued in respect of uncertain future liability. In

such situation the provisions of Section 138 of the Act would not attract and if a cheque so issued is dishonoured, no offence u/s. 138 of the Negotiable Instruments Act can be inferred.

5. The appellant has also produced the letter written by the accused marked at Ex. P. 40 to contend that the accused had admitted the liability. The contents of the letter discloses that the accused admits the principal amount but however disputes the interest claimed and states that the amount reflected in the cheques is not the correct legal liability. Section 20 of N.I. Act declares that inchoate instruments are also valid and legally enforceable. In the case of a signed blank cheque, the drawer gives authority to the drawee to fill up the agreed liability. If the drawee were to dishonestly fill up any excess liability and the extent of liability if it becomes bona fide matter of civil dispute in such case, the drawer has no obligation to facilitate the encashment of cheque. In the instant case the reply Ex. P. 40 discloses that long before presentation of cheque, the extent of liability was disputed but ignoring the objection, the company filled up the cheque for an amount not admitted by the drawer. If the accused were to prove that there is a bona fide dispute with regard to extent of liability, the dishonour of cheque under such circumstance does not attract prosecution u/s. 138 of N.I. Act. The dismissal of complaint is sound and proper. The appeal is dismissed."

SUIT ON PRONOTE - NECESSARY TO PROVE CONSIDERATION

Thangarasu vs. Arumugam: MANU/TN/0338/2012

31. In a Suit on pronote, it is not necessary to aver consideration or to prove it. The Court places the burden upon the Respondent/Defendant to prove want of consideration. The presumption in law does not depend upon admissions or denials of the Respondent/Defendant. It is one thing in a given case that the Appellant/Plaintiff has failed to prove particular consideration for a pronote. It is an entirely another thing to say that there is no consideration at all for the pronote.

32. In Law, as soon as the making of a Pronote is established, the presumption operates If there is some evidence that the transaction is not honest, then the Court of Law can draw an inference that the recitals therein are not true.

33. A debtor may plead and prove actual discharge in a manner or on terms different from those contemplated by or provided for in the documents evidencing the debt. Admission of having signed on a blank paper is no admission of execution of a document. When execution of the Pronote itself is denied and the only fact which is proved is that the thumb impression has been obtained on a blank sheet of paper, then the presumption will not arise

34. One of the conditions for the presumption to operate as per Section 118 of the Negotiable

Instruments Act is that the due and proper execution of the instrument has been proved or admitted. After all, the word 'execution' implies 'conscious execution and knowledge of its contents'.

35. It is to be borne in mind that on consideration, his presumption only contrary appears or atleast appears probable. As a matter of fact, Section 118 of the Negotiable Instruments Act speaks 'for consideration'. Nowhere, it expressly or impliedly refers 'consideration' as mentioned in the Negotiable Instruments Act. Therefore, the term 'for consideration' is quite general and will have to be interpreted in a literal sense.

Justice S. Vimala of Madras High Court in the case of M. Kokila vs. A. Dhanalakshmi : MANU/ TN/ 0933/ 2014 - 2014 (4) CTC 805

7.1. Moreover, the necessity to borrow money for the defendant has been substantiated through the admission made by D.W.1 herself. The defendant has admitted that her husband suffered loss in the business and thereafter he filed an insolvency application with an averment that his indebtedness was to the extent of Rs. 35,00,000/-. Therefore, there had been a necessity to borrow money. This circumstance would strongly probablise the case of the plaintiff that the defendant borrowed money.

7.2. The first appellate court (in paragraph 12) has put the onus on the plaintiff to prove the passing of consideration which is unfortunate, especially when

the first appellate court was aware of the presumption under Section 118 of the Negotiable Instruments Act. The finding that the presumption under Section 118 of the Negotiable Instruments Act is applicable only in respect of passing of some consideration and does not justify any presumption as to the quantum of consideration is not correct. This distinction is not contemplated under Section 118 of the Negotiable Instruments Act.

7.3. The finding that passing of exact consideration has to be proved by the plaintiff, is a perverse finding, when the plaintiff has proved the execution of promissory note.

7.4. This presumption under Section 118 of the Negotiable Instruments Act, is applicable and it can be drawn not only when the execution is admitted, but also when the execution is proved. If there is an admission by the defendant regarding execution, then the plaintiff is relieved of the botheration to prove the same. But, it is not mandatory that, to invoke the presumption, there should be an admission of execution. What is required is proof of execution. The proof may come either by admission of the defendant or through the plaintiff adducing evidence. Once the plaintiff proves the execution of the promissory note, then the burden to prove that there was no consideration is on the defendant as per the decision reported in MANU/KE/0008/1991 : AIR 1991 Kerala Page 39 (Marimuthu Gounder vs. Radha Krishnan).

Ranganayaki vs. Kasinatha Padayachi and Ors.:

MANU/TN/3830/2011 "Admittedly, the suit promissory note was not executed by the 1st Defendant. It is alleged that it was executed only by the husband of the 1st Defendant. After a few days of execution of the suit promissory note, it is alleged that Karunakaran died. When the execution of the very promissory note and the borrowal of the money under the same is disputed, the burden is heavily upon the Plaintiff alone to prove that the deceased Karunakaran borrowed the money for which he executed the promissory note. Court in Anumolu Narayana Rao Minor and another by their mother and Guardian Anumolu Ramadevamma v. Ghattaraju Venkatappayya and Anr. MANU/TN/0219/1936 : 1937 (1) MLJ 543 whereinCourt has held that when the claim is for recovery of money due under promissory note from the legal heirs of the deceased executant, the burden is upon the Plaintiff to prove that the money was in fact borrowed by the deceased and the promissory note was executed by him. Applying the said principle, we have to now analyze as to whether the Plaintiff has proved that the deceased Karunakaran borrowed money and executed the suit promissory note. during cross examination, regarding the source of money for lending the same to the deceased Karunakaran, the Plaintiff has stated that he had money in his account in the bank and one day prior to the execution of the promissory note, he withdrew

from the bank and accordingly, he paid the same to the deceased Karunakaran at the time when the promissory note was executed. The trial court disbelieved this version and accordingly dismissed the suit. However, during the pendency of the appeal suit, the Plaintiff has produced a bank pass-book and the same has been exhibited as Ex.A.4. This document has been produced by the Plaintiff with a view to prove that the money was withdrawn by him one day prior to the execution of promissory note and the same was paid on the date of execution of the promissory note by him to the deceased Karunakaran. The first appellate court on perusal of the same has held that a sum of Rs. 4,000/- had been withdrawn from the bank just a few days prior to the date of execution of the promissory note and the Plaintiff would have paid the balance of money from his pocket. This conclusion arrived at by the first appellate court, in my considered opinion, is perverse. A perusal of Ex.A.4 would go to show that one day prior to the execution of the promissory note, that was on 08.03.1988, no amount was withdrawn from the bank. The bank pass-book further shows that on 03.03.1988, a sum of Rs. 4,000/- was withdrawn and the balance of amount lying in the account was only a sum of Rs. 68.25 paise. Thus, as per the bank pass-book, as on 08.03.1988, there was a paltry amount of Rs. 68.25 paise in the bank account of the Plaintiff. Thus, the contention of the Plaintiff that he withdrew Rs. 6,000/- on 08.03.1988 from his account and he paid

the same on 09.03.1988 cannot be true at all. This vital aspect has not been explained away by the Plaintiff. Thus, the Plaintiff has failed to discharge his burden of proving that he had enough money to lend to the deceased Karunakaran as on 08.03.1988 and that he paid the same on 09.03.1988 and further the suit promissory note was executed by the deceased Karunakaran for the said purpose. Thus, I have got no hesitation to hold that the judgment of the first appellate court is perverse inasmuch as the first appellate court has imposed the burden to disprove the execution of the promissory note on the 1st Defendant instead of throwing the burden at the hands of the Plaintiff to prove the lending of money and execution of the suit promissory note. If the established legal principle regarding the burden of proof is applied, it is crystal clear that the Plaintiff has failed to prove that the deceased Karunakaran borrowed Rs. 6,000/- and executed the promissory note. In such view of the matter, the decree and judgment of the first appellate court cannot be allowed to sustain. Accordingly, I answer both the substantial questions of law in favour of the Appellant/1st Defendant and thus the second appeal must succeed."

**WHEN PROMISSORY NOTE IS FOR OLD
TRANSACTION QUESTION OF LIMITATION**

**Bhagwati Devi vs. Jameela Begam and Ors.:
MANU/MP/0325/2013 - ILR 2013 MP 1193**

It is undisputed fact on record that the impugned suit was filed by the applicant herself to recover sum of promissory note as alleged executed on 17-3-1991 by Munna Khan the predecessor in title of the respondents. It is also undisputed fact that such pronote was executed by Munna Khan by accepting the liability of earlier arrears of sum. It is settled proposition of law whenever the negotiable instrument takes place between the parties then old transaction becomes the new transaction for all the purposes, including the purpose for assessing the period of limitation to initiate the proceedings. As the promissory note was executed on 17-3-1991 and the impugned suit being filed on 16-1-1994 within three years from the date of execution of promissory note within limitation.

In Subramaniam Naidu V. T.N.Rajendran, MANU/TN/0061/1999 : 1999 (1) CTC 529, it is held by this Court that 'the Plaintiff failed to prove that defendant paid money only on promissory note and there is no material to show last payment was made on promissory note and that the suit is held to be barred by limitation.'

**LIMITATION APPLIES TO CLAIMS AND NOT FOR
RAISING DEFENCE**

Shamrao Suryavanshi and Ors. vs. Pralhad Bhairoba Suryavanshi by Lrs. and Ors. AIR 2002 SC 960: MANU/SC/0093/2002 The established rule of limitation is that law of limitation is not applicable to a plea taken in defence unless expressly a provision is made in the statute. The law of limitation applies to the suits and applications. The various articles of the Limitation Act show that they do not apply to a defence taken by a defendant in a suit. Thus the law of limitation bars only an action in a court of law. In fact, what the Limitation Act does is, to take away the remedy of a plaintiff to enforce his rights by bringing an action in a court of law, but it does not place any restriction to a defendant to put forward any defence though such defence as a claim made by him may be barred by limitation and cannot be enforced in a court of law. On the said principle, a defendant in a suit can put forward any defence though such defence may not be enforceable in a court of law, being barred by limitation.

FUNDAMENTAL RULES OF PLEADINGS IN CASE OF PROMISSORY NOTE

Justice S. Vimala of Madras High Court in the case of M. Kokila vs. A. Dhanalakshmi : MANU/ TN/ 0933/ 2014 - 2014 (4) CTC 805

6.1. The fundamental rules of pleadings are:-

- 1) Every pleading must state facts and not law.
- 2) It must state all the material facts and material facts only.
- 3) It must state only the facts on which the party pleading relies and not the evidence by which they are to be proved.
- 4) It must state such facts concisely, but with precision and certainty.

The materials on which, a party relies are Facta Probanda (the facts to be proved) and they should be stated in the pleadings.

The facts by means of which they are to be proved are Facta Probanda and they are not to be stated.

6.2. The drafting of pleadings is an art which demands high degree of professional skill, knowledge, expertise and experience. It is stated to be, not a child's play. The function of pleadings is primarily for the benefit of the parties and for the assistance of court. It is the duty of the court to peruse the pleadings atleast at the time of framing of issues and to strike out matters which are unnecessary, scandalous, frivolous or vexatious or which may tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise an abuse of process of court (Order 6 Rule 16).

6.3. Parties are expected to state only essential facts so that the other party may not be taken by surprise. Pleadings are expected to be concise and precise.

6.4. Pleadings in mofussil are not strictly construed as pleadings in high court(MANU/SC/0011/1963 :

AIR 1964 SC 538 Badat And Co. vs. East India Trading Co.). It has been repeatedly held that pleadings in the mofussil court are loosely drafted and that liberal construction should be always given to such pleadings.

6.5. From the rules of pleadings, it is evident that, it is enough if the plaintiff pleads that the defendant has executed a promissory note dated so and so and the plaintiff is not expected to state who is an attesting witness/who is the scribe etc. In other words, he is not expected to state, through what evidence he will prove his case. Therefore, the finding of the first appellate court that there is omission in the pleadings regarding the attesting witness and scribe and that it is fatal, cannot be sustained.

6.6. Similarly, the place and time of execution of the promissory note need not be mentioned in the plaint itself. In fact, in the plaint, the place of execution has been mentioned as Karur in the paragraph relating to cause of action. Similarly, non issuance of pre-suit notice has been commented upon but with a cautious remark that it is not a condition precedent.

CONDITIONAL ACCEPTANCE OR ABSOLUTE ACCEPTANCE ON SATISFACTION DEPENDS ON PARTIES INTENTION

Citi Bank N.A. and Ors. vs. Standard Chartered Bank and Ors.: MANU/SC/0793/2003 AIR 2003 SC 4630 It is well settled that where an instrument, a

cheque or negotiable instrument, is given by the debtor and accepted by the creditor, the question whether the instrument was taken as an absolute payment or a conditional payment is one of the fact depending on the intention of the parties. When the creditor takes an instrument by way of absolute satisfaction of the debt then the creditor cannot fall back on the original transaction and is restricted to the terms of that instrument only. In the present case the SCB asked for and accepted an SGL of Canbank payable to the Citi Bank in absolute satisfaction of the Citi Bank's original obligation to give to SCB bonds of the face value of Rs. 44.58 crores. SCB asked for the SGL of Canbank which was in possession of the Citi Bank and accepted the same voluntarily and unconditionally indicating to the fact that SGL was taken as satisfaction deemed fit within the meaning of Section 63 of the Contract Act. There was no intention of the parties that taking of the SGL was conditional, i.e., that if SCB did not get the bonds from CMF, the SCB would hold Citi Bank liable for the bonds. Under the circumstances, the authorities cited by the SCB of conditional acceptance of the pronote are not applicable.

CHAPTER - 5

BANKERS LIEN AND SETT OFF

BANKERS LIEN ON ACCOUNTS

The Bombay High Court in the matter of State Bank of India v. Javed Akhtar Hussain and another 1992 Mh.L.J. 1080 considered the question of Bank exercising lien over customer's account unilaterally and without giving notice to the customer and it has been held that the action of the Bank in keeping lien over both these accounts was unilateral and high handed and observed as under in paragraph 12:- "12. The action of keeping lien was a sort of suo motu act exercised by the Bank/applicant in the present case, even without giving notice to the non-applicant No.2 and his wife. Even though the applicant had filed Special Darkhast No. 200 of 91, it could have moved the court for passing orders in respect of the amounts invested in TDR and RD accounts. However, the action of the applicant in keeping lien over both these accounts was unilateral and high-handed and even it is not befitting the authorities of the State Bank of India to do so. If such thing would continue, perhaps in future the customer would lose his confidence in the Bank and I am afraid that the days are not far off."

The below quoted decision has been followed by the **M.P. High Court in the matter of State Bank of India v. Madhya Pradesh Iron & Steel Works Pvt. Ltd., Raipur and others AIR 1998 MP 93** - Halesowen Presswork & Assemblies Ltd. v. Westminster Bank Ltd. (1970) 3 WLR 625 in which Lord Denning M.R. held as under: - "Seeing that the banker's lien is no true lien, in order to avoid confusion, I think we should discard the use of the word "lien" in this context and speak simply of a banker's "right to combine accounts": or a right to "set off" one account against the other. Using this phraseology, the question in this case is: suppose a customer has one account in credit and another in debit. Has the banker a right to combine the two accounts so that he can set off the debit against the credit, and be liable only for the balance? The answer to this question is: Yes, the banker has a right to combine the two accounts whenever he pleases, and to set off one against the other, unless he has made some agreement, express or implied, to keep them separate. Conversely, the customer has a right to call on the banker to combine the two-accounts, and to set off one against the other unless there is some agreement, express or implied, to the contrary."

Apex Court in Syndicate Bank V. Vijay Kumar, AIR 1992 SC 1066, (1992) 2 SCC 330 wherein, the scope and meaning of the expression "Banker's lien" was discussed as follows : 6. In Halsbury's Laws of

England, Vol.20, 2nd Edn. p.552, para 695, lien is defined as follows: "Lien is in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. In this primary sense it is given by law and not by contract."

In Chalmers on Bills of Exchange, Thirteenth Edition Page 91 the meaning of "Banker's lien" is given as follows: "A banker's lien on negotiable securities has been judicially defined as "an implied pledge." A banker has, in the absence of agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking business in respect of any balance that may be due from such customer."

In Chitty on Contract, Twenty-sixth Edition, Page 389, Paragraph 3032 the Banker's lien is explained as under: "By mercantile custom the banker has a general lien over all forms of commercial paper deposited by or on behalf of a customer in the ordinary course of banking business. The custom does not extend to valuables lodged for the purpose of safe custody and may in any event be displaced by either an express contract or circumstances which show an implied agreement inconsistent with the lien.... The lien is applicable to negotiable instruments which are remitted to the banker from the customer for the purpose of collection. When collection has been made the proceeds may be used by the banker in

reduction of the customer's debit balance unless otherwise earmarked."

In Paget's Law of Banking, Eighth Edition, Page 498 a passage reads as under; "THE BANKER'S LIEN Apart from any specific security, the banker can look to his general lien as a protection against loss on loan or overdraft or other credit facility. The general lien of bankers is part of law merchant and judicially recognised as such."

In *Brandao v. Barnett*, (1846) 12 Cl. and Fin. 787 it was stated as under: "Bankers most undoubtedly have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with lien."

"The above passages go to show that by mercantile system the Bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right of the banker judicially recognised and in the absence of an agreement to the contrary, a Banker has a general lien over such securities or bills received from a customer in the ordinary course of banking business and has a right to use the proceeds in respect of any balance that may be due from the customer by way of reduction of customer's debit balance. Such a lien is also applicable to negotiable instruments including FDRs which are remitted to the

Bank by the customer for the purpose of collection. There is no gainsaying that such a lien extends to FDRs also which are deposited by the customer."

In the matter of Punjab National Bank Ltd. v. Arura Mal Durga Das and another, AIR 1960 Punjab 632

bankers lien has been defined by the Punjab High Court as under: -"The statutory law in India does not expressly refer to the Banker's lien in respect of cash deposits, ... Strictly speaking the use of the word 'lien in relation to money - though frequently used, is not correct. It is confined to securities and property in Bank's custody. A distinction is drawn between a Banker's lien, on its clients, paper, goods and security etc. and the Bank's right to set off deposits against debts due to it from its depositors. It may arise from the contract, or from mercantile usage or by operation of law. ... The rule of English law that the Bank has a lien or more appropriately, a right to set off against all monies of his customers in his hands has been accepted as the rule in India. According to this rule, when monies are held by the Bank in one account and the depositor owes the Bank on another account, the Banker by virtue of his lien has a charge on all monies of the depositor in his hands and is at liberty to transfer the monies to whatever account, the banker may like with a view to set off or liquidate the debts. ... It has to be remembered that bank's right to apply a deposit to an indebtedness due from the depositor,

results from the right of set off obtaining between persons occupying creditor and debtor relationship with mutual demand existing between them."

In Radhey Shyam Gupta v. Punjab National Bank and Another [AIR 2009 SC 930] the Apex Court has held that pensionary benefits and gratuity received in cash and converted into Fixed Deposits, cannot be attached.

Andhra Pradesh High Court in Bank of Baroda -vs- D.Radha Krishna Reddy (2007) 6 ALD 824, wherein in paragraph 14, it has been held as follows: "14.....The bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right to the banker judiciously recognised and in the absence of agreement to contrary by virtue of statutory provision under Section 171 of the Contract Act the banker has a general lien over such securities and amounts in its possession. He has the right to use the proceeds towards adjustment of the debt due to him from the customer. Such a lien is also applicable to negotiable instruments including fdrs of the customer which are lying with the bank. Merely because the said fixed deposit was created subsequent to the loan transaction it would not make any difference. The bank has a right to adjust all the amounts which are in their possession and which

belong to the customer on the date they adjust the said amount irrespective of the date on which the transaction which gave rise to the said claim took place."

Supreme Court in the case of Punjab National Bank and others vs. Surendra Prasad Sinha reported in AIR 1992 SC 1815, even a time barred debt to the bank can be adjusted against security held by the Bank. The creditor when he is in possession of an adequate security, the debt due could be adjusted from the security, in his possession and custody. The bank had in its possession the F.D.R. as guarantee for due payment of the debt and bank appropriated the amount towards the debt due and payable by the principal debtor. The respondent and his wife stood guarantors to the principal debtor, jointly executed the security bond and entrusted the F.D.R. as security to adjust the outstanding debt from it at maturity. Therefore, though the remedy to recover the debt from the principal debtor is barred by limitation, the liability still subsists. In terms of the contract the bank is entitled to appropriate the debt due and credit the balance amount to the saving bank account of the respondent. Thereby the appellant did not act in violation of any law, nor converted the amount entrusted to them dishonestly for any purpose.

LIEN CAN BE ENFORCED, IF MUTUAL DEMANDS EXIST BETWEEN BANKER AND CUSTOMER

In Firm Jaikishen Dass Jinda Ram v. Central Bank of India Ltd., AIR 1960 Punj 1, it was held that the following two rights flow out of the relationship of debtor and creditor namely: (1) the right of the customer to demand repayment of the amounts due to him if and when he so desires, and (2) the right of the bank to appropriate the moneys, funds and securities of the customer coming into its possession in the course of their dealings for repayment of the customer's indebtedness. This latter right is known as banker's lien. A bank can enforce its lien if mutual demands exist between itself and the customer, that is, when they mutually exist between the same parties and between them in the same capacity.

In this case two partnership firms with same set of partners had two separate accounts with the bank. The court held that the bank was entitled to appropriate the monies belonging to a firm for payment of an overdraft of another firm, because although two separate firms are involved they are not two separate legal entities and cannot be distinguished from the members who compose them. Mutual demands existed between the bank on the one hand and the persons constituting firms on the other. Nor it could be said that these demands did not exist between the parties in the same right.

JOINT ACCOUNT CREATION OF TRUST OR GIFT

In the Division Bench of Kerala High Court case a question arose whether the deposit of amount in the name of wife by the husband would constitute a gift in her favour, in **P.Narayana Menon v. Bhageerathi Amma (AIR 1985 Kerala. 14)**. The money was deposited in the joint names of husband and wife on the condition that it is payable to Either or Survivor or deposit in the name of his wife alone does not constitute a gift by him to his wife. It was also further held that in such a case without any declaration of trust there is creation of trust in favour of the beneficiary, in the absence of contrary intention or unless it can be proved that an actual gift of the amount was intended. The legal position settled in Narayana Menon's case an express declaration is not at all necessary for the creation of a trust and hence the amount held by the (wife).. with the deceased (husband) on his death would be in trust for his legal heirs as far as his one half share over the same is concerned.

Vijaya Bank and Ors. vs. Naveen Mechanised Construction (Private) Limited and Ors. 2004(1)KCCR356 Bank guarantees furnished have been returned and cancelled as the work was completed by respondent company -- Bank exercising lien and refused to return the securities stating that it is exercising the Lien over the said securities towards the discharge of debt of another company which the respondent is a director and also the company is a

subsidiary of the parent company. Court held that "It is not the case of the appellant-Bank that the petitioners have subsequently borrowed any amount and that the security is withheld for any amount due from the petitioners and wherefore in the absence of any specific authorisation or lien conferred upon the appellant-Bank to retain the security towards the discharge of any debt in respect of other Companies, the Bank is not at all justified in retaining the security as Section 171 of the Contract Act would only enable the Bank to retain the security for repayment of debt borrowed by the same person. In the absence of any express clause in the contract entered into by the petitioners and the Bank, there is no justification to withhold the securities.

Supreme Court in Gurbax Rai and Ors. v. Punjab National Bank, New Delhi AIR1984SC1012 ,

wherein their Lordships have observed that it is not open to the Bank to adjust the amount recovered for the pledged goods for wiping out separate dues of the individual partners as the goods that were pledged belong to the firm and the goods were kept against the cash credit facility of the firm.

The Mangalore Catholic Co-operative Bank Limited, Mangalore v. M. Sundara Shetty ILR 1988 KAR 970 , wherein this Court has held that security cannot be utilized by the Bank even for a

subsequent debt incurred under Section 171 of the Contract Act.

BANKERS LIEN OVER DEBTOR AND SURETY DEPOSITS

S. Vasupalaiah vs. The Vysya Bank, Kodagenahalli Branch ILR 2001 KARNATAKA 5015 Though the remedy to recover the debt from the principal debtor is barred by limitation, the liability still subsists and the bank is entitled to appropriate the debt due from the amounts which are in possession either belonging to the principal debtor or the surety as it is settled law that the liability of the surety is coextensive with that of the principal debtor. The bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right to the banker judiciously recognized and in the absence of agreement to contrary by virtue of statutory provision under Section 171 of the Contract Act the banker has a general lien over such securities and amounts in its possession. The Court concluded that even though the remedy to recover the debt from the principal debtor was hit by limitation, the liability still subsists and the bank was entitled to get the debt due from the amounts which were in its possession either belonging to the principal debtor or the surety. It

stated that the bank has the right to proceeds towards adjustment of the debt due from the customer. Merely because the surety's fixed deposit was created consequent to the loan transaction it would not make any difference. Therefore, it was held that the bank was justified in adjusting the amount due under the fixed deposit towards the loan amount of principal debtor for whom the Petitioner stood as guarantor.

Mangalore Catholic Co-operative Bank Ltd. vs. M. Sundara Shetty ILR 1988 KARNATAKA 970

A banker's lien when it is not excluded by special contract express or implied extends to all bills, cheques and money entrusted or paid to him and all securities deposited with it in his character as a banker. Strictly it is confined to securities and property in the custody of a banker. It is not necessary that the assignee should have given notice to the Bank. There may however be circumstances inconsistent with the general lien of a banker and the most frequent example of this is a deposit expressed to cover a specified advances. In that event the lien will not extend beyond the agreed advance may be a over draft or the like. However, if the customer knowingly permits the banker to retain the security, a general lien may be implied and its protection may then be claimed in respect of other advances as well....What class of securities may be the subject of lien is not very clearly defined. The Class of securities cannot, on the one hand, be limited to fully negotiable

securities. On the other hand, the general lien cannot be said to extend to all classes of documents, even though they might otherwise be utilised as security.... It all depends on the intention of the customer. If the owner of the land gave to the Bank on equitable mortgage by deposit of deeds to secure the then present and future general balance of account, then certainly the Banker would have a general lien over such deeds in respect of the future debt.

BANKERS LIEN EXTENDS TO BORROWERS PROPERTY

Madras High Court in M/S.A.A. Associates vs Indian Overseas Bank, Decided on 19 March, 2019 - W.P.No.4865 of 2016

Following the aforesaid judgment, (Syndicate Bank V. Vijay Kumar, AIR 1992 SC 1066) ... this Court in the latest judgment dated 31.10.2018 in the case of C.R.Ramachary and another V. Indian Overseas Bank, rep. by its Chief Manager and others, (W.P.No.16812 of 2018) held thus :

“6. The first decision relied on by the learned counsel for the petitioners is State Bank of India and another v. Jayanthi and others, reported in 2011 (3) MLJ 245 : 2011 (2) CTC 465. He pointed out that in the said case it was observed that the deposit of title deeds by which the mortgage was created by the deceased borrower, N.P.S.Mahendran, was for a specific purpose to cover an advance for a specific loan. When

such is the situation, the borrower having deposited the documents in order to secure a specific transaction, the bank cannot contend that they could hold the documents for a balance due in a different loan account, where the said N.P.S.Mahandran is not a borrower. We have carefully perused the said decision and we find that as far as the second loan account is concerned, the deceased N.P.S.Mahendran was not a borrower. In such circumstances, it was held that the documents furnished as security in relation to the first loan account could not be withheld in relation to the other loan account where deceased N.P.S.Mahandran was not the borrower. However, such are not the facts in the present case. In the present case, admittedly, the first petitioner is the borrower in relation to all the three loans. Hence, this decision would not apply to the case of the petitioners.

12. In the decisions relied upon by the learned counsel for the petitioners all the properties did not belong to the borrower.

In the present case, the properties belong to the first petitioner/borrower. Therefore, in view of the finding of the Supreme Court, as reproduced above, we are of the view that the respondent bank has a general lien over the securities and other instruments deposited by the petitioner with the bank in the ordinary course of banking and such general lien being a valuable right of the bank as per the decision of the Supreme Court, it cannot be ignored in the absence of an agreement to the contrary. In such case, the

respondent bank is well within its rights to retain the documents furnished by way of collateral security in relation to the earlier two loan accounts which were settled, as the third loan was not settled. In such view of the matter, we do not find any merit in the submissions made by the learned counsel for the petitioners.”

BANKERS LIEN EXPLAINED IN DETAIL

Hon'ble Shri Justice Sanjay K. Agrawal of Chattisgarh High Court in the case of Dr. Achinto Chakraborty vs Chairman & Managing Director, ...

Decided on 22 August, 2017 in Writ Petition (Art. 227) No.375 of 2017, In order to resolve the dispute, it would be necessary, at the outset, to consider first as to whether the Bank has exercised the right to lien / right to set off as prevalent in the banking system. The right of banker's lien is provided under Section 171 of the Indian Contract Act, 1872 which states as under:
 - "171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.--Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such

balance, goods bailed to them, unless there is an express contract to that effect."

The word 'bailment' has been defined under Section 148 of the Indian Contract Act, 1872 and it refers to delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished be returned.

The word 'banker' has been defined by the Black's Law Dictionary as 'a person who engages in the business of banking'. 'Retain' has been defined as continue to hold and keep possession of something. 'Any goods' means that the article has to be a tangible movable article. The Sale of Goods Act, 1930 defines 'goods' under Section 2 (7) to mean any kind of movable property other than actionable claims and money. Thus, for the operation of Section 171 of the Indian Contract Act, 1872, the deposits made in the bank accounts cannot be treated as goods and the right of the banker as lien over the deposit is not applicable. This would demonstrate that the principle of bailment shall not apply in a case where a customer has deposited his money in the account to a bank and the bank promises to pay back the same upon demand with interest or under any term as it may exist.

In the matter of **Devendrakumar Lalchandji v. Gulabsingh Nekhesingh, AIR 1946 Nagpur 114** the Nagpur High Court has clearly held that there is a distinction between bailment and deposit. Money paid into a bank to be credited in the current account of

the person making the payment does not constitute a case of bailment. Therefore, Section 171 of the Indian Contract Act, 1872 does not apply to a case where the bank intends to balance an account by making deductions from the account of a customer.

. In the matter of **Punjab National Bank Ltd. v. Arura Mal Durga Das and another, AIR 1960 Punjab 632** bankers lien has been defined by the Punjab High Court as under: - "The statutory law in India does not expressly refer to the Banker's lien in respect of cash deposits, ... Strictly speaking the use of the word 'lien in relation to money - though frequently used, is not correct. It is confined to securities and property in Bank's custody. A distinction is drawn between a Banker's lien, on its clients, paper, goods and security etc. and the Bank's right to set off deposits against debts due to it from its depositors. It may arise from the contract, or from mercantile usage or by operation of law. ... The rule of English law that the Bank has a lien or more appropriately, a right to set off against all monies of his customers in his hands has been accepted as the rule in India. According to this rule, when monies are held by the Bank in one account and the depositor owes the Bank on another account, the Banker by virtue of his lien has a charge on all monies of the depositor in his hands and is at liberty to transfer the monies to whatever account, the banker may like with a view to set off or liquidate the debts. ... It has to be remembered that bank's right to apply a deposit to an

indebtedness due from the depositor, results from the right of set off obtaining between persons occupying creditor and debtor relationship with mutual demand existing between them."

In the matter of **Syndicate Bank v. Vijay Kumar and others, (1992) 2 SCC 330** the issue of Banker's lien has been considered by the Supreme Court and it has been held as under: - "Lien in its primary sense is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. In this primary sense it is given by law and not by contract."

The above passage goes to show that by mercantile system the Bank has a general lien over all forms of securities or negotiable instruments deposited by or on behalf of the customer in the ordinary course of banking business and that the general lien is a valuable right of the banker judicially recognised and in the absence of an agreement to the contrary, a Banker has a general lien over such securities or bills received from a customer in the ordinary course of banking business and has a right to use the proceeds in respect of any balance that may be due from the customer by way of reduction of customer's debit balance. Such a lien is also applicable to negotiable instruments including FDRs which are remitted to the Bank by the customer for the purpose of collection. There is no gainsaying that

such a lien extends to FDRs also which are deposited by the customer.

Applying these principles to the case before us we are of the view that undoubtedly the appellant-Bank has a lien over the two FDRs. In any event the two letters executed by the judgment-debtor on 17-9-80 created a general lien in favour of the appellant-Bank over the two FDRs. Even otherwise having regard to the mercantile custom as judicially recognised the Banker has such a general lien over all forms of deposits or securities made by or on behalf of the customer in the ordinary course of banking business. ..."

Therefore, it is quite vivid that the money deposited by a person to the bank does not constitute a case of bailment and Section 171 of the Indian Contract Act, 1872 would not be applicable and as such, the banker's right of lien would not be applicable in the case of deposit of money by the customer with the Bank.

WHAT IS SETT OFF IN BANKING SECTOR

Hon'ble Shri Justice Sanjay K. Agrawal of Chattisgarh High Court in the case of Dr. Achinto Chakraborty vs Chairman & Managing Director, ...
Decided on 22 August, 2017 in Writ Petition (Art. 227) No.375 of 2017,

Now, right to set off would come into play. Right to set off is a right judicially recognised which arises

from the principle of equity and it is an equitable right. Right to set off is not a contractual right but follows from the custom and usages of the mercantile law on the principle of equity and justice. The principles of banker's right of set off are followed in India in the same lines as has been followed by English law. The Indian Contract Act, 1872 is not a complete code in itself and Section 1 of the Act itself saved any usage or custom of trade.

What is right of set off has precisely been explained by the High Court of Punjab in **Punjab National Bank Ltd. v. Arura Mal Durga Das and another, AIR 1960 Punjab 632** as under:- "The generally accepted rule respecting a bank's right of set off was stated in 3 Ruling Case Law, 591 in the following words: - "The right of a Bank to apply a deposit to an indebtedness due from the depositor, results from the right of set-off, which obtains between persons occupying the relation of debtor and creditor, and between whom there exist mutual demands, and it is familiar law that mutuality is essential to the validity of a set off, and that, in order that one demand may be set-off against another, both must mutually exist between the same parties.""

In order to exercise the right of set off there is no requirement that there should be an agreement between the Bank and the customer to exercise that right of set off. In the matter of **Krishna Kishore Kar v. United Commercial Bank and another, AIR 1982 Cal 62** the Calcutta High Court held as under: - "22.

... There was no express contract between the plaintiff and the defendant Bank regarding the manner of adjustment of this outstanding balance in the cash credit account. All the proceeds of the fixed deposits had been duly credited in this account. Therefore the Bank could exercise its general lien under S. 171 of the Contract Act for making up the loss caused by the plaintiff and the Bank had rightly adjusted this claim against Rs. 93,500/- set free by order dated 1-7-1963." The above mandate of the Calcutta High Court in Krishna Kishore Kar (supra) has been followed by the Gujarat High Court in the matter of Shivam Construction Co., Ahmedabad and others v. Vijaya Bank, Ahmedabad and others. AIR 1997 Guj 24 6.

In the matter of Indian Bank, Rasipuram v. Sri Annapoorna Finance, Rasipuram, AIR 2002 Mad 180 the Madras High Court has held that for exercising the right of set off there should exist mutual demand between the Bank and the customer and in paragraph 11, it has been observed as under: - "11. ... It is true that the bank can exercise its right to set-off in the money balance of a customer, provided there should exist mutual demands and in order that one demand might be set-off against another, both must exist mutually between the parties. ..."

Court in Brahmayya Vs. V.K.P.Thangavelu Nadar and others [AIR 1956 Madras 570] has held that the persons in whose name a fixed deposit is made with the bank has no ownership to the moneys and it is actually a debt due by the bank to the

depositors. Therefore, it can only be a case of set-off. Even in a case of set-off, it should be shown that the persons in whose name the money is deposited are under an obligation to pay the bank. In the absence of such obligation the bank cannot exercise its right of set-off.

In the matter of Anumati v. Punjab National Bank - (2004) 8 SCC 498 wherein the bank exercised the right of set off against the monies kept in joint holder of customer, Their Lordships of the Supreme Court in paragraphs 11 and 16 held as under: - "11. Parties to a joint account are not automatically authorised to pledge each other's credit. According to Sheldon and Fidler : Practice and Law of Banking 8, a banker should not lend money to the parties to a joint account, either by means by an overdraft or in any other way, without obtaining from each of the parties an undertaking to be severally as well as jointly liable to pay the loan. The banker has no right to set off the credit balance in the joint account except in respect of another joint account of the same parties (ibid). The difference between the joint fixed deposit account and a joint savings, current or other account, is that there is no right in the depositors to operate such account and withdraw the moneys except upon maturity. 16. In our view, these decisions correctly set out the law. In the present case the contract in respect of the joint account was between the respondent Bank and the husband and wife. The fixed deposit was not a debt due by the Bank to Mam Chand alone which

could be set off by the Bank against any claim that the Bank may have had against Mam Chand. Besides the right of Mam Chand was to receive the money deposited only after it matured, if he survived. Supposing Mam Chand had died before the fixed deposit matured, the only person entitled to get the money would be the appellant. This right of the appellant could not have been taken away without her consent."

It is clear from the above discussion that the right of set off is available to the banker when there is debt due and when there is a mutual demand between the banker and the customer. It is further clear that the banker's right of set off does not flow from any statute or Act, but is based on the principle of equity.

NECESSITY OF NOTICE IN BANKERS LIEN

The Bombay High Court in the matter of State Bank of India v. Javed Akhtar Hussain and another 1992 Mh.L.J. 1080 considered the question of Bank exercising lien over customer's account unilaterally and without giving notice to the customer and it has been held that the action of the Bank in keeping lien over both these accounts was unilateral and high handed and observed as under in paragraph 12:- "12. The action of keeping lien was a sort of suo motu act exercised by the Bank/applicant in the present case, even without giving notice to the non-applicant No.2 and his wife. Even though the applicant had filed

Special Darkhast No. 200 of 91, it could have moved the court for passing orders in respect of the amounts invested in TDR and RD accounts. However, the action of the applicant in keeping lien over both these accounts was unilateral and high-handed and even it is not befitting the authorities of the State Bank of India to do so. If such thing would continue, perhaps in future the customer would lose his confidence in the Bank and I am afraid that the days are not far off."

M.P. High Court in the matter of State Bank of India v. Madhya Pradesh Iron & Steel Works Pvt. Ltd., Raipur and others. AIR 1998 MP 93 25. Queen's Bench Division in Halesowen Presswork & Assemblies Ltd. (1970) 3 WLR 625 speaking through Roskill J, held as under: - "It must be remembered, however, that the plaintiff might have ordered a transfer of his assets from the one branch to the other and the defendants' bank, on the other hand, must have a corresponding right. In general it might be proper or considerate to give a notice to that effect, but there is no legal obligation on the bankers to do so, arising either from express contract or the course of dealing between the parties."

INTENTION OF BANK CUSTOMER TO BE SEEN

Karnataka High Court, in the case of Mangalore Catholic Coopeative Bank Limited v. M.Sundaran Shetty, reported in ILR 1988 Karnataka 970, It

was observed that if the owner of the land give the bank title deeds, by way of equitable mortgage to secure, the then, present and future general balance of accounts, the bank, will have a general lien for such deeds in respect of future debt. However it was specifically held that if the title deeds are deposited for a specific loan and there was no intention on the part of the customer to create a private charge on the property, even for the subsequent loan, the bank cannot claim general lien on the title deed deposited with the bank. In this case also, the learned Single Judge of the Karnataka High Court, has observed that Section 171 of Indian Contract Act, is not applicable to the title deeds, which are deposited to secure the loan by stating that this form of security is not the one, which attracts Section 171 of the Indian Contract Act.

A banker's lien when it is not excluded by special contract express or implied extends to ail bills, cheques and money entrusted or paid to him and all securities deposited with it in his character as a banker, Strictly it is confined to securities and property in the custody of a banker. It is not necessary that the assignee should have given notice to the bank. There may however be circumstances in consistent with the general lien of a banker and the most frequent example of this is a deposit expressed to cover a specified advances. In that event the lien will not extend beyond the agreed advance may be a overdraft or the like. However, if the customer

knowingly permits the banker to retain the security, a general lien may be implied and its protection may then be claimed in respect of other advances as well.

WHETHER BANK HAVE LIEN ON GUARANTORS PROPERTY

A Division Bench of Orissa High Court in the case of **Alekha Sahoo v. Puri Urban Co-operative Bank Ltd. and another, reported in AIR 2004 ORISSA 142** had occasion to deal with almost similar situation and held that the general lien of Bankers under Section 171 of Contract Act can be enforced on the security of principal debtor and not the guarantor. The petitioner before the High Court availed the gold loan of Rs.12,000/- each on 20.08.2001 from the respondent Bank on pledge of gold ornaments and cleared the gold loans on 22.07.2003. When the petitioner demanded return of gold ornaments, the respondent Bank stated that before availing the gold loans, the petitioner stood as guarantor for the cash credit loan advanced to a third party on 25.06.2001. Since the principal borrower and the guarantor are jointly and severally liable for the outstanding amount, the Bank took a stand that they have a general lien on the gold ornaments pledged by the petitioner under Section 171 of the Contract Act. It was held that the Bank can retain as security for general balance of an account of

a customer, goods bailed to them by that customer and not goods bailed to them by the guarantor (some other customers).

A Division Bench of Karnataka High Court, in the case of **Vijaya Bank and another v. Naveen Mechanised Construction (P) Ltd., and others reported in AIR 2004 KARNATAKA 199**, has dealt with a situation where some securities were furnished by the petitioner's company for the purpose of issuing Bank guarantees and after all the bank guarantees were returned and cancelled due to completion of work by petitioner's company, the securities were retained by the Bank as the Director of the company was also the guarantor for a transaction with another company against which recovery proceedings were initiated before Debt Recovery Tribunal. It was held that Bank was not at all justified in retaining the security as Section 171 of the Contract Act would only enable the Bank to retain the security for payment of debt borrowed by the same person.

Calcutta High in the case of Nayabuddin vs. Union of India and others AIR 2016 Calcutta 172, wherein equitable mortgage was created jointly by two brothers in connection with a house loan. One brother availed cash credit facility through a firm. The other brother filed a writ petition seeking a direction to the Bank to allow him to repay the entire home loan and to release the title deeds of the flat mortgaged in respect of such

loan upon repayment. It was held that Bank has banker's lien over a security which has come in its possession in its usual course of business, namely, the title deeds of the immovable property pledged as security in respect of the home loan account.

Madras High Court Judgment dated 16.03.2012 in W.P.No.19096 of 2011 in the case of C.Lalitha Raj vs. The Assistant General Manager, State Bank of India wherein the mother of a borrower was holding an account with the Bank. The loan advanced to the borrower was also guaranteed by the mother as a guarantor. When the son committed default, the amount lying in the account of mother / guarantor was attached by the Bank in exercise of its general lien. The mother filed the Writ Petition and the same was dismissed by placing reliance on the judgment of Hon'ble Supreme Court in Syndicate Bank case.

Hon'ble Gauhati High Court in the case of Tilendra Nath Mahanta vs. United Bank of India and others, AIR 2002 Gauhati 1, "S.148 of Contract Act deals with Bailment. Bailment is established only when there is delivery of goods by one person to another for some purpose upon a contract that they shall when the purpose is accomplished, be returned or disposed according to the direction of the person who delivers the goods. It is the duty of the bailee to deal with the goods according to the direction of the bailer. Under Section 171 of the Act, Bankers lien can properly arise

only over thing which belongs to customer but which are held by the Bank as security. There will be no bailment in case of fixed deposits or separate accounts. It has not been given to the Bank as security for doing / accomplishing certain things. Fixed deposits are basically a loan in the hands of bankers. Where an amount is deposited with the Bank in a separate account which has no connection or relation with the loans in suit in a different account, in the absence of a specific contract, the amount in the other account cannot be adjusted in the claim against the suit. The lien of a bank over the money of its customer does not extend to amounts which have been handed over or accepted by the Bank for a specified purpose by the customers."

ATTACHMENT OF SEVERAL FUNDS BE MADE AFTER IT REACHES EMPLOYEE

Hon'ble Supreme Court in the case of Union of India vs. Jyoti Chit Fund and Finance, AIR 1976 SC 1163, laying down as under: "We may state without fear of contradiction that provident fund amounts, pensions and other compulsory deposits covered by the provisions we have referred to, retain their character until they reach the hands of the employee. The reality of the protection is refunded to illusory formality if we accept the interpretation sought. We take a contrary view, which means that attachment is possible and lawful only after such amounts are received by the employee. If doubts may

possibly be entertained on this question, the decision in Radha Kissen's case AIR 1969 SC 762, erases them. Indeed, our case is a fortiori one, on the facts. A bare reading of Radha Kissen makes the proposition fool-proof that so long as the amounts are provident fund dues then, till they are actually paid to the Government Servant, who is entitled to it on retirement or otherwise, the nature of the dues is also authority for the benign view that the government is a trustee for those sum and has an interest in maintaining the objection in court to attachment."

Calcutta High Court in the case of Bidyut Baran Halder vs The State Of West Bengal & Ors, Decided on 3 August, 2017 - W.P. No. 15420 (W) of 2017

Section 13 of the Payment of Gratuity Act, 1972 protects a gratuity payable under the Act of 1972 from attachment in execution of any decree or order of any civil, revenue or criminal Court. Section 4 of the Act of 1972 deals with payment of gratuity. Sub-section (6) thereof permits an employer to forfeit gratuity on the grounds specified therein. The gratuity of an employee whose services have been terminated for any act of willful omission or negligence causing any damage or loss to the employer will forfeit the gratuity to the extent of the damage or loss so caused. The gratuity payable to an employee may be wholly or partially forfeited for the grounds as provided in sub-clause (i) and (ii) of clause (b) of Sub-section (6) of Section 4. In other words, an employer forfeits gratuity on the

happening of events specified in Section 4(6) of the Act of 1972 and not otherwise. Except the forfeiture provided for in Section 4(6) of the Act of 1972, gratuity is payable and is immune from attachment. The gratuity receivable by the employee is, therefore, protected. The protection is not available only when the conditions in Section 4(6) are fulfilled.

In the present case, although the petitioner was discharged from service, in a disciplinary proceeding, the order of punishment was without any financial implication. The order of punishment does not impose a forfeiture of gratuity. An employee of the bank may have dual capacities while dealing with the bank. A person can be an employee of the bank as well as its borrower at the same time. There will therefore be two contracts. One being the contract of employment and the other being the contract of loan. As an employee, it may be entitled to receive gratuity for the services rendered in terms of the contract of employment. As a borrower, under the contract of loan, the employee concerned can or may execute documents authorising the bank to adjust the amounts receivable as pensionary and retirement benefits including gratuity with that of the loan amount. The present case concerns gratuity only. The intentions of the legislature under the provisions of the Act of 1972 are clear. An employee is entitled to gratuity unless forfeited in the manner and for the grounds provided for in Section 4(6) of the Act of 1972. The gratuity received under the Act of 1972 is immune from

execution of an order of Court. Therefore, a bank cannot approach a Court for the purpose of attaching a gratuity received or receivable by an employee including its own employee for adjustment toward the loan amount. The question is whether a bank, who is not entitled to approach the Court to attach a pensionary benefit, is entitled to adjust the pensionary benefit with a loan without recourse to a Court of law on the strength of documents executed by the employee. The documents executed by the employee permitting the bank to adjust the pensionary benefits will not allow the bank to obtain an order of attachment from the Court in view of Section 13 of the Act of 1972. The same set of documents, therefore, should not be read to mean that it would permit the bank to adjust the loan amount with the pensionary benefits on its own. Such permission would initiate against the provisions of Section 23 of the Contract Act, 1872. The loan documents permitting the bank to adjust gratuity would be without lawful consideration and with an unlawful object as, if, permitted, it would defeat the provisions of the Act of 1972. Even if the borrower is an employee of the bank, then also the bank cannot adjust the pensionary benefits with the outstanding loan amount on its own. The bank has to physically make over the gratuity amount to the employee. Upon the employee receiving the benefits, the employee concerned may voluntarily pay the loan amount to the bank. There has to be an act of wilful volition by the

employee concerned in making over the gratuity to the bank towards adjustment of the loan amount after receipt of the gratuity amount. Deposit of the pension amount in the bank account in the name of the employee and having the same adjusted towards the loan amount on the strength of documents executed by the employee will not suffice.

Essentially the bank is seeking to obtain relief indirectly which it could not obtain directly. It could have raised the issue of adjustment or banker's lien before the competent authority. It did not do so. A banker's lien or a general lien is available only when a property belonging to the borrower comes into the custody of the bank in its usual course of business. The gratuity receivable by an employee cannot be said to be a property of the employee coming into the possession of a bank, in its usual course of business, before the actual physical payment thereof to the employee concerned. The contract of employment between the bank and its employee gives rise to the earnings of the employee. Such earnings are the property of the employee, which the bank, who pays or makes over the same to its employee. Moreover, by payment of the amount in a bank account of the employee, the employer cannot claim that, the quantum of retiral benefits such as pension or gratuity paid to the employee, come into its possession and, therefore, can be adjusted or a banker's lien can be validly exercised thereon. The adjustment or exercise of banker's lien can be made, only if, the

employee makes over the pensionary benefits voluntarily to the bank. In this case, the petitioner has not done so.

WHETHER BANK HAD LIEN OVER THE MONEY DEPOSITED IN APPEAL

In Axis Bank vs. SBS Organics Private Limited and Ors MANU/SC/0438/2016 : (2016) 12 SCC 18 : AIR 2016 SC 2024 the questions that arose for consideration were whether the money deposited, in order to maintain an appeal Under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal ('DRAT', for short) could be adjusted towards the amount due to the concerned bank and whether the concerned bank had a lien over the money so deposited. The submissions of the concerned bank were recorded in para 4, the definitions of terms 'secured asset', 'secured creditor', 'secured debt' and 'security interest' were set out in paras 9 to 12. It was observed in para 14 that the secured creditor was entitled to proceed "only against the secured assets" mentioned in the notice Under Section 13(2) of the SARFAESI Act. The nature of pre-deposit in terms of Section 18 of the SARFAESI Act was considered in para 21 and it was concluded that such deposit was neither a 'secured asset' nor was a 'secured debt' and in the circumstances, the prayer for refund of amount in deposit was required to be allowed. This Court also considered the submission that the concerned bank

had lien on the deposited amount in terms of Section 171 of the Contract Act, 1872. The submission was rejected.

"15. A conspectus of the aforesaid provisions shows that under the scheme of the SARFAESI Act, a secured creditor is entitled to proceed against the borrower for the purpose of recovering his secured debt by taking action against the secured assets, in case the borrower fails to discharge his liability in full within the period specified in the notice issued Under Section 13(2) of the Act. It is the mandate of Section 13(3) of the Act that the notice issued Under Section 13(2) should contain details of the amount payable by the borrower and also the secured assets intended to be enforced by the secured creditor in the event of non-payment of the dues as per Section 13(2) notice. Thus, the secured creditor is entitled to proceed only against the secured assets mentioned in the notice Under Section 13(2). However, in terms of Section 13(11) of the Act, the secured creditor is also free to proceed first against the guarantors or sell the pledged assets. To quote: 13(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in Clauses (a) to (d) of Sub-section (4) in relation to the secured assets under this Act.

17. Though Section 17 of the Act is titled as a 'Right to appeal', the liberty granted to the aggrieved person

is to make an application to the DRT and the parties are at a liberty to lead evidence before the tribunal. And thus, it is actually a trial before the DRT on the grievances of the aggrieved persons in the respect of the measures taken by the secured creditor for recovery of dues of the borrower in proceeding against the secured assets.

19. Any person aggrieved by the order of the DRT Under Section 17 of the SARFAESI Act, is entitled to prefer an appeal along with the prescribed fee within the permitted period of 30 days. For 'preferring' an appeal, a fee is prescribed, whereas for the Tribunal to 'entertain' the appeal, the aggrieved person has to make a deposit of fifty per cent of the amount of debt due from him as claimed by the secured creditors or determined by the DRT, whichever is less. This amount can, at the discretion of the Tribunal, in appropriate cases, for recorded reasons, be reduced to twenty- five per cent of the debt.

21. We are also conscious of the fact that such a precondition is present in several statutes while providing for statutory appeals, like The Income-Tax Act, 1961, The Central Excise Act, 1944, The Consumer Protection Act, 1986, The Motor Vehicles Act, 1988, etc. However, unlike those statutes, the purpose of the SARFAESI Act is different, it is meant only for speedy recovery of the dues, and the scheme Under Section 13(4) of the Act, permits the secured creditor to proceed only against the secured assets. of course, the secured creditor is free to proceed against

the guarantors and the pledged assets, notwithstanding the steps Under Section 13(4) and without first exhausting the recovery as against secured assets referred to in the notice Under Section 13(2). But such guarantor, if aggrieved, is not entitled to approach DRT Under Section 17. That right is restricted only to persons aggrieved by steps Under Section 13(4) proceeding for recovery against the secured assets.

22. The Appeal Under Section 18 of the Act is permissible only against the order passed by the DRT Under Section 17 of the Act. Under Section 17, the scope of enquiry is limited to the steps taken Under Section 13(4) against the secured assets. The partial deposit before the DRAT as a pre-condition for considering the appeal on merits in terms of Section 18 of the Act, is not a secured asset. It is not a secured debt either, since the borrower or the aggrieved person has not created any security interest on such pre-deposit in favour of the secured creditor. If that be so, on disposal of the appeal, either on merits or on withdrawal, or on being rendered infructuous, in case, the Appellant makes a prayer for refund of the pre-deposit, the same has to be allowed and the pre-deposit has to be returned to the Appellant, unless the Appellate Tribunal, on the request of the secured creditor but with the consent of the depositors, had already appropriated the pre-deposit towards the liability of the borrower, or with the consent, had adjusted the amount towards the dues, or if there be

any attachment on the pre-deposit in any proceedings Under Section 13(10) of the Act read with Rule 11 of The Security Interest (Enforcement) Rules, 2002, or if there be any attachment in any other proceedings known to law.

23. We are also unable to agree with the contention that the Bank has a lien on the pre-deposit made Under Section 18 of the SARFAESI Act in terms of Section 171 of The Indian Contract Act, 1872. Section 171 of The Indian Contract Act, 1872 on general lien, is in a different context: 171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.-- Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

24. Section 171 of The Indian Contract Act, 1872 provides for retention of the goods bailed to the bank by way of security for the general balance of account. The pre-deposit made by a borrower for the purpose of entertaining the appeal Under Section 18 of the Act is not with the bank but with the Tribunal. It is not a bailment with the bank as provided Under Section 148 of The Indian Contract Act, 1872. Conceptually, it should be an argument available to the depositor, since the goods bailed are to be returned or otherwise

disposed of, after the purpose is accomplished as per the directions of the bailor."

CREDITORS LIEN OR CHARGE AND TAX DUES

Karnataka Goods and Services Act 2017 enforced from 27-06-2017, following sections relevant on the topic.

Section 81. Transfer of property to be void in certain cases.- Where a person, after any amount has become due from him, creates a charge on or parts with the property belonging to him or in his possession by way of sale, mortgage, exchange, or any other mode of transfer whatsoever of any of his properties in favour of any other person with the intention of defrauding the Government revenue, such charge or transfer shall be void as against any claim in respect of any tax or any other sum payable by the said person: Provided that, such charge or transfer shall not be void if it is made for adequate consideration, in good faith and without notice of the pendency of such proceedings under this Act or without notice of such tax or other sum payable by the said person, or with the previous permission of the proper officer.

Section 82. Tax to be first charge on property. Notwithstanding anything to the contrary contained in any law for the time being in force, save as otherwise provided in the Insolvency and Bankruptcy Code, 2016 (Central Act 31 of 2016), any amount

payable by a taxable person or any other person on account of tax, interest or penalty which he is liable to pay to the Government shall be a first charge on the property of such taxable person or such person.

Section 83. Provisional attachment to protect revenue in certain cases.-

(1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed. (2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1).

In CGST act

Same above provisions in Central GST Act 2017 which above provisions brought to force from 01-07-2017.

Insolvency and bankruptcy code

In Insolvency and Bankruptcy Code, 2016, following sections are relevant on the topic.

Section 3(4) "charge" means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage;

Section 3 (31) "security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee;

Section 3 (30) "secured creditor" means a creditor in favour of whom security interest is created;

Section 3 (33) "transaction" includes a agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor;

Section 3 (34) "transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien;

Section 3 (35) "transfer of property" means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property;

Section 53 : Distribution of assets

1[(1) Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified, namely:--

(a) the insolvency resolution process costs and the liquidation costs paid in full;

(b) the following debts which shall rank equally between and among the following:--

(i) workmen's dues for the period of twenty-four months preceding the liquidation commencement date; and

(ii) debts owed to a secured creditor in the event such secured creditor has relinquished security in the manner set out in section 52;

(c) wages and any unpaid dues owed to employees other than workmen for the period of twelve months preceding the liquidation commencement date;

(d) financial debts owed to unsecured creditors;

(e) the following dues shall rank equally between and among the following:--

(i) any amount due to the Central Government and the State Government including the amount to be received on account of the Consolidated Fund of India and the Consolidated Fund of a State, if any, in respect of the whole or any part of the period of two years preceding the liquidation commencement date;

(ii) debts owed to a secured creditor for any amount unpaid following the enforcement of security interest;

(f) any remaining debts and dues;

(g) preference shareholders, if any; and

(h) equity shareholders or partners, as the case may be.

(2) Any contractual arrangements between recipients under sub-section (1) with equal ranking, if disrupting

the order of priority under that sub-section shall be disregarded by the liquidator.

(3) The fees payable to the liquidator shall be deducted proportionately from the proceeds payable to each class of recipients under sub-section (1), and the proceeds to the relevant recipient shall be distributed after such deduction.

Explanation.--For the purpose of this section--

- (i) it is hereby clarified that at each stage of the distribution of proceeds in respect of a class of recipients that rank equally, each of the debts will either be paid in full, or will be paid in equal proportion within the same class of recipients, if the proceeds are insufficient to meet the debts in full; and
- (ii) the term "workmen's dues" shall have the same meaning as assigned to it in section 326 of the Companies Act, 2013 (18 of 2013).]

In SARAFESI ACT

Section 26E of the SARAFESI Act reads as under:

"26E. Notwithstanding anything contained in any other law for the time being in force, after registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority."

Explanation.-For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy

proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

Section "35. The provisions of this Act to override other laws--The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

Section "37. Application of other laws not barred.--The provisions of this Act or the rules made thereunder shall be in addition to and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

Section 31B has been inserted in the Recovery of Debts and Bankruptcy Act, 1993 ("the RDB Act") by the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016 w.e.f. 1.9.2016 which contains a non-obstante clause and which expressly provides that the secured debts shall be paid in priority over all other debts and Government dues including the State taxes.

Sections 31B and 34 of the Recovery of Debts and Bankruptcy Act, 1993, read as under:

Sections "31B. Priority to secured creditors.- Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority. Explanation.-For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

Sections "34. Act to have over-riding effect.--(1) Save as provided under sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made thereunder shall be in addition to and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act,

1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) [the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989)."

Article 246 of the Constitution of India which is the source of power for both Parliament and the State legislature. While Article 246(1) of the Constitution of India gives exclusive power to the Parliament to make laws with respect to any matters enumerated in List 1 in the Seventh Schedule, the power of the State legislature as flowing from Article 246(2) is expressly "subject to" clause (1). Moreover, it is provided in Article 254 of the Constitution that in case of inconsistency between the laws made by the Parliament and the laws made by the State legislature, it is the law made by the Parliament which shall prevail.

Kalupur Commercial Co-operative Bank Ltd. vs. State of Gujarat Decided on 23.09.2019 Reported in MANU/GJ/1958/2019

Case law before amendment:-

The issue as regards the claim of priority of the secured creditor vis-a-vis the first charge of the property under the State Legislation was considered by the Supreme Court in the case of **Central Bank of India vs. State of Kerala & ors, reported in MANU/SC/0306/2009 : (2009) 4 SCC 94**. The

Supreme Court, in the said decision took the view that if the State Act creates first charge on the property, then the secured creditors cannot have the claim against the statutory provision. The Supreme Court also took into consideration Section 100 of the Transfer of Property Act, 1882. The relevant paras of the judgment in the case of Central Bank of India are quoted hereunder for ready reference.

"111. However, what is most significant to be noted is that there is no provision in either of these enactments by which first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower.

112. Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest vis-a-vis Section 69 or Section 69A of the Transfer of Property Act. In terms of that subsection, secured creditor can enforce security interest without intervention of the Court or Tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of Narasimham Committee's 2nd Report in which specific reference

was made to the provisions relating to mortgages under the Transfer of Property Act.

113. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the non obstante clause in Section 13 and gave primacy to the right of secured creditor vis a vis other mortgagees who could exercise rights under Sections 69 or 69A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like Section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc. Sub-section (7) of Section 13 which envisages application of the money received by the secured creditor by adopting any of the measures specified under sub-section (4) merely regulates distribution of money received by the secured creditor. It does not create first charge in favour of the secured creditor.

116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or Securitisation Act, the provisions contained in those

Acts cannot override other legislations. Section 38C of the Bombay Act and Section 26B of the Kerala Act also contain non obstante clauses and give statutory recognition to the priority of State's charge over other debts, which was recognized by Indian High Courts even before 1950. In other words, these sections and similar provisions contained in other State legislations not only create first charge on the property of the dealer or any other person liable to pay sales tax, etc. but also give them overriding effect over other laws. ...

126. While enacting the DRT Act and Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognized. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal. The reason for this omission appears to be that the new legal regime

envisages transfer of secured assets to private companies.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Development and Regulation) Act, 1957, Section 30 of the Gift-Tax Act and Section 529A of the Companies Act, 1956 would have been incorporated in the DRT Act and Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

131. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis a vis Section 38C of the Bombay Act and Section 26B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as the Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors."

Observations of Gujarat High court

16. Indisputably, the judgment of the Apex Court in the case of Central Bank of India (supra) was prior to the amendment in the Act, 2002 and 1993 respectively. However, what is important are the observations of the Supreme Court as contained in para-126 of this decision quoted above. The Supreme Court observed that while enacting the DRT Act, the Parliament was aware of the law laid down by the Supreme Court, wherein priority of the State dues was recognized. If the Parliament intended to create the first charge in favour of the Banks, Financial Institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529A of the Companies Act or

Section 11(2) of the EPF Act and ensured that notwithstanding the series of judicial pronouncements, the dues of Banks, Financial Institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax etc. The Supreme Court proceeded to observe that the fact of the matter was that no such provision had been incorporated in either of those enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal.

17. In our prima facie opinion, such observations probably might have weighed with the Parliament which ultimately might have led to the introduction of Section 31B in the RDB Act, 1993 and 26E in the SARFAESI Act, 2002.

Case law after amendment:-

The Madhya Pradesh High Court, in the case of Bank of Baroda v. Commissioner of Sales Tax, M.P., Indore and another, reported in MANU/MP/0331/2018 : (2018) 55 GSTR 210 (MP), had the occasion to consider identical issue. The Madhya Pradesh High Court took cognizance of the notice of sale by the commercial department. The notice of sale was issued on 19th July 2017. The High Court took notice of the fact that Section 31-B came into force with effect from 1st September 2016 and by virtue of the said amendment, the right of the secured

creditors to realize the secured dues and debts dues, which are payable to the secured creditors by sale of assets over which security has been created, has priority over all other debts and Government dues including revenue, taxes, cesses and rates due to the Central Government, State Government and local authorities.

The Full Bench of the Madras High Court, in the case of **The Assistant Commissioner (CT), v. The Indian Overseas Bank and others, reported in MANU/TN/3743/2016 : AIR 2017 Mad 67**, was called upon to answer the following two questions:

"(i) As to whether the Financial Institution, which is a Secured Creditor, or the Department of the Government concerned, would have the 'Priority of Charge' over the Mortgaged property in question, with regard to the tax and other dues and

(ii) As to the status and the rights of a Third party Purchaser of the Mortgaged property in question."

40. Sanjay Kishan Kaul, CJ. (as His Lordship then was) observed as under: "...We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, ... seeking to introduce Section 31B in the Principal Act....

.....There is, thus, no doubt that the rights of a secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and

Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016.

.....The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

.....The aforesaid would, thus, answer question (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.

.....In so far as question (b) is concerned, the same is stated to relate only to auction sales, which may be carried out in pursuance to the rights exercised by the secured creditor having a mortgage of the property. This aspect is also covered by the introduction of Section 31B, as it includes "secured debts due and payable to them by sale of assets over which security interest is created."

Bank of Baroda vs. Commissioner of Sales Tax, Indore and Ors. : MANU/MP/0331/2018 - [2018] 55 GSTR 210(MP)

In the considered opinion of this court, the Enforcement of Security Interest and Recovery of Debts and Loans and Miscellaneous Provisions (Amendment) Act, 2016 came into force with effect from September 1, 2016 and by virtue of the said

amendment, the right of secured creditors to realise the secured dues and debts dues, which are payable to the secured creditors by sale of assets over which security has been created, is having priority over all other debts and Government dues including revenue, taxes, cesses and rates due to Central Government, State Government and local authorities.Not only this, it is having overriding effect over all other enactment including the provisions of Madhya Pradesh VAT Act, Central Sales Tax Act, Entry Tax Act and any other Tax Act.Though, an attempt has been made by the State Government to demonstrate before this court that the amendment will not disentitle to recover the dues by them as the dues are outstanding since 2012.Nothing prevented the State Government to recover the dues since 2012 and the State Government woke up from plumber only after the amendment has come into force and by virtue of the amendment in the Central Act, this court is of the considered opinion that by no stretch of imagination, the State Government can be permitted to auction the property in question as the Bank of Baroda is having priority in the matter in light of the amendment which has been quoted above.

NON OBSTANTE CLAUSE ITS EFFECT

Justice J.B. Pardiwala and Justice A.C. Rao through Division Bench of Gujarat High Court in **Kalupur Commercial Co-operative Bank Ltd. vs. State of**

Gujarat Decided on 23.09.2019 Reported in MANU/GJ/1958/2019

Section 31B of the RDB Act also starts with a non-obstante clause 'notwithstanding anything contained in any other law for the time being in force'.

Section 26E of the SARFAESI Act also starts with a non-obstante clause 'notwithstanding anything contained in any other law for the time being in force'.

21. A non-obstante clause is generally appended to a section with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision in the same or other Act mentioned in the non-obstante clause. It is equivalent to saying that in spite of the provisions of Act mentioned in the non-obstante clause, the provision following it will have its full operation or the provisions embraced in the non-obstante clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. [See 'Principles of Statutory Interpretation', 9th Edition by Justice G.P. Singh Chapter V, Synopsis IV at pages 318 & 319].

22. When two or more laws or provisions operate in the same field and each contains a non-obstante clause stating that its provision will override those of any other provisions or law, stimulating and intricate problems of interpretation arise. In resolving such problems of interpretation, no settled principles can be applied except to refer to the object and purpose of each of the two provisions, containing a non-obstante clause. Two provisions in same Act each containing a

non-obstante clause, requires a harmonious interpretation of the two seemingly conflicting provisions in the same Act. In this difficult exercise, there are involved proper consideration of giving effect to the object and purpose of two provisions and the language employed in each. [See for relevant discussion in para 20 in *Shri Swaran Singh & Anr. v. Shri Kasturi Lal*; MANU/SC/0071/1976 : (1977) 1 SCC 750]

23. Normally the use of the phrase by the Legislature in a statutory provision like 'notwithstanding anything to the contrary contained in this Act' is equivalent to saying that the Act shall be no impediment to the measure [See Law Lexicon words 'notwithstanding anything in this Act to the contrary']. Use of such expression is another way of saying that the provision in which the non-obstante clause occurs usually would prevail over the other provisions in the Act. Thus, the non-obstante clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principle enacting provision to which the non-obstante clause is attached. [See *Bipathumma & Ors. v. Mariam Bibi*; 1966(1) Mysore Law Journal page 162, at page 165]

Case laws quoted:-

In State of West Bengal v. Union of India, MANU/SC/0086/1962 : AIR 1963 SC 1241, it is observed as under: "The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs."

In Union of India v. Maj. I.C. Lala, MANU/SC/0197/1973 : AIR 1973 SC 2204, the Supreme Court held that non-obstante clause does not mean that the whole of the said provision of law has to be made applicable or the whole of the other law has to be made inapplicable. It is the duty of the Court to avoid the conflict and construe the provisions to that they are harmonious.

In Union of India v. G.M. Kokil, MANU/SC/0210/1984 : AIR 1984 SC 1022, the Supreme Court, at Paragraph 10, held as follows: "It is well-known that a non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provision over some contrary provision that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions."

In Chandavarkar Sita Ratna Rao v. Ashalata S. Guram, MANU/SC/0531/1986 : [1986] 4 SCC 447, at Paragraph 67, the Supreme Court held as follows: "67. A clause beginning with the expression "notwithstanding anything contained in this Act or in

some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in *The South India Corporation (P.) Ltd., v. The Secretary, Board of Revenue, Trivandrum & Anr.*, MANU/SC/0215/1963 : AIR 1964 SC 207 at 215-[1964] 4 SCR 280."

In Vishin N. Kanchandani v. Vidya Lachmandas Khanchandani, MANU/SC/0509/2000 : AIR 2000 SC 2747, at Paragraph 11, the Supreme Court held that, "There is no doubt that by non-obstante clause the Legislature devices means which are usually applied to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other statute. In other words such a clause is used to avoid the operation and effect of all contrary provisions. The phrase is equivalent to showing that the Act shall be no impediment to measure intended. To attract the

applicability of the phrase, the whole of the section, the scheme of the Act and the objects and reasons for which such an enactment is made has to be kept in mind."

In ICICI Bank Ltd. v. SIDCO Leathers Ltd., MANU/SC/2337/2006 : [2006] 67 SCL 383 (SC), the Supreme Court, at Paragraphs 34, 36 and 37, held as follows: "34. Section 529-A of the Companies Act no doubt contains a non-obstante clause but in construing the provisions thereof, it is necessary to determine the purport and object for which the same was enacted.... 36. The non-obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy.... 37. A non-obstante clause must be given effect to, to the extent the Parliament intended and not beyond the same."

The Supreme Court, in the case of Central Bank of India v. State of Kerala, MANU/SC/0306/2009 : [2009] 4 SCC 94, at Paragraphs 103 to 107, considered many cases on non-obstante clause, which are extracted, "103. A non obstante clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole. While interpreting non-obstante clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the non obstante clause is used. This rule of interpretation has been applied in several decisions.

In State Bank of West Bengal v. Union of India, [MANU/SC/0086/1962 : (1964) 1 SCR 371], it was observed that: "68... the Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs."

In Madhav Rao Jivaji Rao Scindia v. Union of India and another [MANU/SC/0050/1970 : (1971) 1 SCC 85], Hidayatullah, C.J. observed that the non obstante clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but "for that reason alone we must determine the scope" of that provision strictly. When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands all alone by itself. A search has, therefore, to be made with a view to determining which provision answers the description and which does not.

In R.S. Raghunath v. State of Karnataka and another [MANU/SC/0012/1992 : (1992) 1 SCC 335], a three-Judge Bench referred to the earlier judgments in Aswini Kumar Ghose v. Arabinda Bose [MANU/SC/0022/1952 : AIR 1952 SC 369], Dominion of India v. Shrinbai A. Irani [MANU/SC/0112/1954 : AIR 1954 SC 596], Union of

India v. G.M. Kokil [MANU/SC/0210/1984 : 1984 (Supp.) SCC 196], Chandravarkar Sita Ratna Rao v. Ashalata S. Guram [MANU/SC/0531/1986 : (1986) 4 SCC 447] and observed: "... The non-obstante clause is appended to a provision with a view to give the enacting part of the provision an overriding effect in case of a conflict. But the non-obstante clause need not necessarily and always be coextensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non-obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules."

In A.G. Varadarajulu v. State of Tamil Nadu [MANU/SC/0232/1998 : (1998) 4 SCC 231], this Court relied on Aswini Kumar Ghose's case. The Court while interpreting non obstante clause contained in Section 21-A of Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 held:- "It is well settled that while dealing with a non-obstante clause under which the legislature wants to give overriding effect to a section, the court must try to find out the extent to which the legislature had intended to give one

provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section.

In Aswini Kumar Ghose v. Arabinda Bose [MANU/SC/0022/1952 : AIR 1952 SC 369], Patanjali Sastri, J. observed: "The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously;"

CHARGE AND MORTGAGE EXPLAINED IN RELATION TO STATE DUES

Justice Devan Ramachandran of Kerala High Court in case of **State Bank of India and Ors. vs. State of Kerala and Ors.: MANU/KE/3448/2019 - 2019 (4) KLT 521**

28. To do this, I will first require to assessively speak on the legal attributes of a 'Charge' and a 'Mortgage'.

29. A 'Charge' is defined under Section 100 of the Transfer of Property Act (TP Act) in the following manner: "Charges.- Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the later person is said to have a charge on the property; and all the provisions hereinbefore contained [which apply

to a simple mortgage shall, so far as may be, apply to such charge]."

30. While so, the statutory amplitude of a 'Mortgage' is explained in Section 58 of the same Act as below: "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.- (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed."

31. It is thus incontestable that a 'Charge' does not create any right over the property but allows the charge holder to deal with the property in the same manner as a simple mortgagee would be entitled to under the various Sections of the TP Act. I say this is uncontestable because Section 100 of the TP Act excludes Mortgage from the definition of a Charge but makes all the provisions applicable to a simple mortgage relevant to a Charge. Further, as is manifest from the second limb of Section 100, a Charge gets extinguished when the property is transferred to another person who obtains it for consideration and without notice of the said Charge. Therefore, while

every Mortgage is a Charge over the property, every Charge is not a Mortgage and does not create any rights over the same in favour of the charge holder.

H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others v. Union of India and Another (MANU/SC/0050/1970 : (1971)

1 SCC 85), - "Under the general law relating to transfer of property, a charge does not give rise to a right in rem : the right is however more than a mere personal obligation, for it is a jus ad rem a right to payment out of property specified : Govind Chandra Pal v. Dwaraka Nath Pal (ILR 35 Cal 837, 843); Raja Sri Shiva Prasad v. Beni Madhab (ILR 1 Pat 387). A charge gives a right to payment out of a specific fund or property, and a right to prior payment; but it does not create a right in rem in the fund or the property. A charge therefore gives rise to a right to receive payment, out of a specified fund or property in preference over others."

Hon'ble Supreme Court in **Dattatreya Shanker Mote and Others v. Anand Chitaman Datar and others (MANU/SC/0334/1974 : (1974) 2 SCC 799)**,

wherein the following were stated rather emphatically:

"In order to ascertain the true import of the terminology used in Section 100 of the Act, it is necessary to state clearly some of the basic concepts embodied in the Act which are beyond controversy. Section 5 defines "transfer of property" as meaning "an Act by which a living person conveys property, in present or in future, to one or more other living

persons, or to himself, or to himself and one or more other living persons", and to "transfer property" is to perform such act. Section 6 says that property of any kind may be transferred, except as otherwise provided by the Act or by any other law for the time being in force other than those mentioned specifically in clauses (a) to (i) which cannot be transferred. Section 8 deals with the operation of transfer and says that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. It then narrates all such incidents having regard to the land, debt, etc., etc. Chapter III of the Act deals specifically with sales of immoveable property, the sale in Section 54 is defined as transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Mortgages are dealt with in chapter IV where mortgage is defined in Section 58(a) as the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan. Different kinds of mortgages are also specified in that section of which clause (b) states what a simple mortgage is, namely, where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged

property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.....A charge on the other hand under Section 100 of the Act is neither a sale nor a mortgage because it creates no interest in or over a specific immoveable property but is only a security for the payment of money."

33. A close survey of the afore judgments thus renders it beyond contest that the words 'First Charge' and 'priority in payment of debts' are virtually synonymous and means the same, except for its semantic variation on account of differing phraseology. In both events, the holder obtains the privilege of recovery before anyone else and hence, whether it is the 'First Charge' or the right to claim 'Priority' in recovery, the ultimate effect and consequence is the same.

34. Thus, even though the KGST Act/KVAT Act creates a 'First Charge' in favour of the Revenue to recover the arrears of tax, the afore provisions of the SARFAESI Act and RDB Act make the secured dues entitled to be paid in priority over such taxes and in fact, elevates the rights of the secured creditor, to recover such dues, also to a position of priority.

36. Irrefragibly, when the secured creditors have a right in priority to have their debts extinguished, obviously, their right to proceed against the property would also rank high than that is claimed by the Revenue. The assertion of the Revenue that their

'Charge' will continue over the property until it is sold by them, hence, is rendered without forensic support to stand on.....

47. The above cited judgments certainly support my views as afore and it axiomatically becomes justified for me to hold that Section 26E of the SARFAESI Act and Section 31B of the RDB Act create a 'First Charge' by way of a priority to the Banks/Financial Institutions to recover and satisfy their debts, notwithstanding any statutory 'First Charge' in favour of the Revenue under the KGST Act/KVAT Act. It is so declared.

CHARGE OF PRIVATE CREDITORS AND UNSECURED DEBTS AND STATE DUES

Constitution Bench of Hon'ble Supreme Court in **Builders Supply Corporation v. Union of India, MANU/SC/0156/1964 : AIR 1965 SC 1061**, wherein it was observed as under:-

"(i) The common law doctrine of the priority of Crown debts had a wide sweep but the question in the present appeal was the narrow one whether the Union of India was entitled to claim that the recovery of the amount of tax due to it from a citizen must take precedence and priority over unsecured debts dues from the said citizen to his other private creditors. The weight of authority in India was strongly in support of the priority of tax dues.

(ii) The common law doctrine on which the Union of India based its claim in the present proceedings had been applied and upheld in that part of India which was known as 'British India' prior to the Constitution. The rules of common law relating to substantive rights which had been adopted by this country and enforced by judicial decisions, amount to 'law in force' in the territory of India at the relevant time within the meaning of Article 372(1). In that view of the matter, the contention of the appellant that after the Constitution was adopted the position of the Union of India in regard to its claim for priority in the present proceedings had been altered could not be upheld.

(iii) The basic justification for the claim for priority of government debts rests on the well-recognised principle that the State is entitled to raise money by taxation, otherwise it will not be able to function as a sovereign Government at all. This consideration emphasises the necessity and wisdom of conceding to the State the right to claim priority in respect of its tax dues."

SALE OF BUSINESS AND TRANSFER OF ASSET EXPLAINED TO FOIST TAX DUES AS CHARGE

The Supreme Court in State of Karnataka & Anr. vs. Shreyas Papers Pvt. Ltd. & Ors. MANU/SC/0084/2006 : (2006) 1 SCC 615 while dealing with the provisions of Section 15(1) of the Karnataka Sales Tax Act, 1957 held that the provisions therein are foisting

liability of defaulting transferor onto the transferee and held that this would be applicable only in case of transfer of "ownership of business" i.e. sale of the business as a going concern and not in case of mere transfer of assets. In that case, the Financial Corporation and Marketing acting under Section 29(1) of the State Financial Corporation took over the assets of defaulting company i.e. land, building, plant and machinery and thereafter advised the same for sale. The first respondent before the Supreme Court entered into agreement with the bank for purchase of the said assets. In the offer of purchase, the first respondent specifically stated that it would take over the unit with zero liabilities and would not be responsible for any existing statutory liabilities except as specified therein. The Corporation accepted the offer and the sale took place. The argument of the appellant that the first respondent was, as transferee of the business of the defaulting company, liable for the latter's tax dues, was rejected. Relevant discussion is found in para 15 of the judgment, which is reproduced hereunder: "15. A careful reading of Section 15(1) of the KST Act shows that the consequences contemplated therein, namely, foisting of the liabilities of the defaulting transferor onto the transferee, would come into effect only if the "ownership of the business" is transferred. Although, Mr. Hegde strenuously urged that "business" could not be separated from the assets of the business, we are unable to accept this contention. Business is an

activity, directed with a certain purpose, more often towards producing income or profit. Ownership of assets is merely an incident rather than a characteristic of business. Hence, the mere transfer of one or more species of assets does not necessarily bring about the transfer of the "ownership of the business" for "ownership of a business" is much wider than mere ownership of discrete or individual assets. In fact, "ownership of business" is wider than the sum of the ownership of a business' constituent assets. Above all, transfer of "ownership of business" requires that the business be sold as a going concern. In our view, therefore, Section 15(1) is intended to operate only when there is complete transfer of "ownership of business" so as to render the transferee as a successor-in-interest of the transferor. Only in such an eventuality does Section 15(1) make the transferee liable for the transferor's sales tax liabilities."

CONSTRUCTIVE NOTICE OF CHARGE TO FIX LIABILITY REQUIRED

The Supreme Court in Ahmedabad Municipal Corporation vs. Haji Abdul Gafur Haji Hussienbhai-MANU/SC/0596/1971 : (1971) 1 SCC 757 was dealing with a case where a person in arrears of the property tax, due under the Bombay Provincial Municipal Corporation Act, 1949 therefore the Municipal Corporation, Ahmedabad created a charge over his property taking him as a defaulter. However,

the property on which the charge was created was sold in execution of a mortgaged decree. When the Municipal Corporation sought to exercise their charge over the property, the purchaser in court-auction filed a suit for a declaration that he was the now owner of the property and that the arrears of the municipal taxes due by the transferor were not recoverable from him by proceeding against the property purchased in the auction. The stand of the Municipal Corporation before the Supreme Court was that since the local law provided for creation of a charge against the property itself for which municipal tax was due, transferee of such properties were imputed with constructive knowledge of any charge created against the properties that they had purchased. The Supreme Court however rejected this argument and held that while constructive notice was sufficient to satisfy the requirement of notice in the proviso to Section 100 of the Transfer of Property Act, whether the transferee had constructive notice of the charge had to be determined on the facts and circumstances of the case. It was held that there could be no fixed presumption as to the transferee having constructive notice of the charge against the property.

LIABILTY OF BANK AND NOT AUCTION PURCHASER TO PAY TAX DUES

In Dena Bank vs. Bhikhabhai Prabhudas Parekh & Co. & Ors.-MANU/SC/0317/2000 : (2001) 247 ITR

165 (SC), the appellant-bank filed suit for recovery of Rs. 19,27,142.29 against the respondent partnership firm and its partners on the basis of a mortgage by deposit of title deeds, entered into by them. Meanwhile, the State Government exercised the right to recover sales tax arrears from the respondent-firm, attached and auctioned the same. The State Government was impleaded as party to the suit. However, the suit was dismissed. During the pendency of the appeal, however, the appellant-bank and the respondent firm reached at a compromise to which the State was not a party. During the pendency of the appeal before the High Court, the High Court passed the decree on the basis of compromise according to its terms after excluding clause (7), which was held to be illegal and not enforceable against the State. The decree passed by the High Court clearly recognised the State's claim as preferential. The Supreme Court held that the High Court rightly directed that any amount recovered by the appellant-bank would first be paid towards meeting arrears of the sales tax and balance, if any, could be adjusted against the amount due to the appellant-bank. Even according to judgement of the Supreme Court in *Dena Bank*, the Bank was held liable to pay the sales tax dues of the State, not the auction purchaser.

The Supreme Court in M/s. Isha Marbles vs. Bihar State Electricity Board-MANU/SC/0632/1995 : 1995 (2) SC 626 has held that a bonafide auction-

purchaser under a statutory sale was not liable to clear electricity dues of the previous owner.

BANK CHARGE SUPERMACY OVER EXCISE DUES MATTER EXPLAINED

The Full Bench of the Madras High Court in *UTI Bank Ltd. vs. Deputy Commissioner of Central Excise-MANU/TN/0188/2007* : AIR 2007 Madras 118 has held as under: "All the decisions relied on by Mr. V.T. Gopalan, clearly show that the Government is entitled to claim its dues/taxes/duties in preference to other ordinary debts. In all those cases there is no provision as found in SARFAESI Act or a specific provision claiming to have "first charge" as provided in Rajasthan Sales Tax Act in *State Bank of Bikaner & Jaipur vs. National Iron & Steel Rolling Corporation* [MANU/SC/0593/1995 : 1995 (2) SCC 19 - Three Judge Bench], *Madhya Pradesh General Sales Tax in State of M.P. vs. State Bank of Indore* [MANU/SC/1134/2002 : 2002 (10) SCC 441 -Three Judge Bench], and *Karnataka Sales Tax Act in Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* [MANU/SC/0317/2000 : (2000) 5 SCC 694]. As explained in the case of Constitution Bench judgment in *Builders Supply Corporation vs. Union of India* [MANU/SC/0156/1964 : AIR (1965) SC 1061], the arrears of tax due to the State can claim priority over private debts and thus the rule of common law amounts to law in force in the territory of British India at the relevant time within the meaning of Article 372

(1) of the Constitution of India and therefore continues to be in force thereafter. In Dena Bank case (cited supra) it is held that the Crown's preferential right to recover all debts over other creditors is confined to ordinary and unsecured creditors."

In the light of the above discussion, we conclude,

"(i) Generally, the dues to Government, i.e., tax, duties, etc. (Crown's debts) get priority over ordinary debts.

(ii) Only when there is a specific provision in the statute claiming "first charge" over the property, the Crown's debt is entitled to have priority over the claim of others.

(iii) Since there is no specific provision claiming "first charge" in the Central Excise Act and the Customs Act, the claim of the Central Excise Department cannot have precedence over the claim of secured creditor, viz., the petitioner Bank.

(iv) In the absence of such specific provision in the Central Excise Act as well as in Customs Act, we hold that the claim of secured creditor will prevail over Crown's debts."

In view of our above conclusion, the petitioner UTI Bank, being a secured creditor is entitled to have preference over the claim of the Deputy Commissioner of Central Excise, first respondent herein.

The Supreme Court in Rana Girders Ltd. vs. Union of India & Ors.-MANU/SC/0803/2013 : (2013) 10 SCC 746 has settled this controversy once and for all.

Therein, the Supreme Court was dealing with the question as to when the liability of auction purchaser (subsequent purchaser) to pay outstanding dues of the Central Excise of the erstwhile owner would arise. The Supreme Court held that only where entire business itself is purchased as an ongoing concern, that the purchaser can be held responsible to discharge liability of Central Excise as well. Mere purchase of some of the properties of a person, who had outstanding dues in respect of excise duty, does not make subsequent purchaser liable therefore, in absence of specific provision in the statute creating first charge relating to government dues/excise dues over said property, which charge binds the subsequent purchaser/transferee either at law or in equity. In the present case, no such statutory provision creating first charge in relation to the excise duty at the relevant time is shown to exist. We may for the facility of reference, reproduce paras 21 to 23 of the aforesaid judgement in Rana Girders, supra which reads as under: "21. A harmonious reading of the judgments in Macson and SICOM would tend us to conclude that it is only in those cases where the buyer had purchased the entire unit i.e. the entire business itself, that he would be responsible to discharge the liability of Central Excise as well. Otherwise, the subsequent purchaser cannot be fastened with the liability relating to the dues of the Government unless there is a specific provision in the Statute, claiming "first charge for the purchaser". As far as Central

Excise Act is concerned, there was no such specific provision as noticed in SICOM as well. Proviso to Section 11 is now added by way of amendment in the Act only w.e.f. 10.9.2004. Therefore, we are eschewing our discussion regarding this proviso as that is not applicable in so far as present case is concerned. Accordingly, we thus, hold that in so far as legal position is concerned, UPFC being a secured creditor had priority over the excise dues. We further hold that since the appellant had not purchased the entire unit as a business, as per the statutory framework he was not liable for discharging the dues of the Excise Department.

22. With this, we now revert to the first issue, namely interpretation of the clause in the Sale Deed for land and building and similar clause in Agreement of Sale for machinery on the basis of which appellant is held to be liable to pay the dues. These clauses have already been incorporated in the earlier portion of our judgment.

23. We may notice that in the first instance it was mentioned not only in the public notice but there is a specific clause inserted in the Sale Deed/Agreement as well, to the effect that the properties in question are being sold free from all encumbrances. At the same time, there is also a stipulation that "all these statutory liabilities arising out of the land shall be borne by purchaser in the sale deed" and "all these statutory liabilities arising out of the said properties shall be borne by the vendee and vendor shall not be

held responsible in the Agreement of Sale." As per the High Court, these statutory liabilities would include excise dues. We find that the High Court has missed the true intent and purport of this clause. The expressions in the Sale Deed as well as in the Agreement for purchase of plant and machinery talks of statutory liabilities "arising out of the land" or statutory liabilities "arising out of the said properties" (i.e. the machinery). Thus, it is only that statutory liability which arises out of the land and building or out of plant and machinery which is to be discharged by the purchaser. Excise dues are not the statutory liabilities which arise out of the land and building or the plant and machinery. Statutory liabilities arising out of the land and building could be in the form of the property tax or other types of cess relating to property etc. Likewise, statutory liability arising out of the plant and machinery could be the sales tax etc. payable on the said machinery. As far as dues of the Central Excise are concerned, they were not related to the said plant and machinery or the land and building and thus did not arise out of those properties. Dues of the Excise Department became payable on the manufacturing of excisable items by the erstwhile owner, therefore, these statutory dues are in respect of those items produced and not the plant and machinery which was used for the purposes of manufacture. This fine distinction is not taken note at all by the High Court."

Rajasthan High court in the case of **Universal Polysack India Pvt. Ltd. vs. Union of India and Ors.**

: MANU/RH/0071/2019 - 2019 (3) WLN 513 (Raj.)

After referring to above decisions states, "The Supreme Court in the aforesaid judgement was dealing with the expression "sale deed" where stipulation was to the effect "all the statutory liabilities arising out of the land shall be borne by the purchaser in the sale deed" and "all the statutory liabilities arising out of the said properties shall be borne by the vendee and the vendor shall not be held responsible in the agreement to sale." In that case, the High Court had taken the view that statutory liability referred to in the sale deed shall also include the excise dues. However, the Supreme Court did not approve of the said approach of the High Court by holding that the expressions in the sale deed as well as in the agreement for purchase of plant and machinery talk of statutory liabilities "arising out of the land" or statutory liabilities "arising out of the said properties" (i.e. the machinery). Thus, it is only that statutory liability, which arises out of the land and building or out of plant and machinery, which is to be discharged by the purchaser. Excise dues are not the statutory liabilities, which arise out of the land and building or the plant and machinery."

CHARGE ON AGRICULTURAL LAND IN KARNATAKA

In Karnataka this is governed by Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act, 1974. It is enforced with effect from 17-07-1975. In this act under section 2 (a) agriculture is defined as follows:

(a) 'agriculture' or 'agricultural purposes' includes making land fit for cultivation, cultivation of land, improvement of land including development of sources of irrigation, raising and harvesting of crops, horticulture, forestry plantation (including tree crops), cattle breeding, animal husbandry, dairy farming, seed farming, pisciculture including the development of fisheries both inland and marine and catching fish and all activities connected therewith or incidental thereto, apiculture, sericulture, piggery, poultry, farming and such other activities as are generally carried on by agriculturists, dairy farmers, cattle breeders, poultry farmers and other categories of persons engaged in similar activities, including processing, marketing, storage and transport of agricultural produce and the acquisition of drought animals, implements and machinery in connection with such activities and such other purposes as the State Government may specify in this behalf;

(b) "agriculturist" means a person who is engaged in agriculture;

Credit agency recognised under the act:-

Section 2 (e) "Credit Agency" means,-

- (i) a banking company as defined in the Banking Regulation Act, 1949;
- (ii) the State Bank of India constituted under the State Bank of India Act, 1955;
- (iii) Subsidiary Bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959;
- (iv) a corresponding new bank constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970;
- (v) the Agricultural Refinance Corporation constituted under the Agricultural Refinance Corporation Act, 1963;
- (vi) Agro-Industries Corporation as defined in clause (c);
- (vii) the Agricultural Finance Corporation Limited, a company incorporated under the Companies Act, 1956; and
- (vii-a) the regional rural banks constituted under the Regional Rural Banks Act, 1976 (Central Act 21 of 1976);
- (viii) any other financial institution notified by the State-Government as a credit agency for the purpose of this Act;

AGRICULTURAL LAND CAN BE SOLD WHEN IT IS MORTGAGED TO CREDIT AGENCY

Under Section 3 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act,

1974.: Removal of restrictions on alienation; Notwithstanding anything contained in any law for the time being in force or any custom or usage having the force of law, it shall be lawful for an agriculturist to alienate the land or his interest therein whether or not a charge or mortgage is subsisting on such land or such interest, by creation of charge or mortgage of such land or interest therein in favour of a credit agency as security for the financial assistance given to him by such credit agency.

CHARGE ON CROPS AND OTHER MOVABLE PROPERTY BY AGRICULTURIST

Under Section 5 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act, 1974.: Charge on crops and other movable property

(1) It shall be lawful for an agriculturist to create, by way hypothecation or otherwise, a mortgage of or a charge on,-

- (a) movable property, owned by him; or
- (b) crops standing or otherwise, raised by him on his own land or land held by him as a tenant including other produce raised by him on such land to the extent of his interest in such crops or produce, in favour of a credit agency as security for the financial assistance given to him.

CO-OPERATIVE RIGHTS IN SUCH MATTER

(2) Notwithstanding anything contained in the Karnataka Co-operative Societies Act, 1959 or any

other law for the time being in force, no charge in respect of financial assistance given by a co-operative society to an agriculturist shall have priority over charge on the crop raised by him, standing or otherwise, or any other movable property in respect of any financial assistance given to him by a credit agency:

Provided that the financial assistance given by the credit agency is prior in point of time to that of any loan advanced to him by the co-operative society.

(3) A credit agency may distrain and sell through an official designated in this behalf by the State Government the crops or other produce or other movables charged to that credit agency to the extent of the agriculturists interest therein and appropriate the proceeds of such sale towards all moneys due to the credit agency from that agriculturist.

PRIORITY OF CHARGES IN AGRICULTURAL LOANS

Under Section 7 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act, 1974.: Priority of charges and mortgages over certain claims

(1) Notwithstanding anything contained in any law for the time being in force, but subject always to the paramount charge in respect of arrears of land revenue,-

(a) no charge or mortgage created on any land or interest therein after the commencement of this Act in favour of the State Government or a co-operative society shall have priority over a charge or mortgage created on such land or interest by an agriculturist in favour of a credit agency as security for financial assistance given to him by such agency after the commencement of this Act and prior to the creation of the charge or mortgage in favour of the State Government or the co-operative society; and

(b) any charge or mortgage created on any land or interest therein in favour of a credit agency as security for financial assistance given to an agriculturist by that credit agency shall have priority over any other charge or mortgage that may have been created over such land or interest in favour of any person other than the State Government, a co-operative society or any other financial institution prior to the date on which the charge or mortgage was created in favour of the credit agency.

(2) Where different charges or mortgages over the same land or any interest therein have been created or executed by an agriculturist in favour of,-

- (i) the State Government; or
- (ii) a co-operative society; or
- (iii) one or more credit agency,

such charges or mortgage out of them as is created or executed as security for the financial assistance given as term loan for development purposes shall have priority over the other charges or mortgages:

Provided that prior notice thereof had been given to, and concurrence had been obtained of the State Government or the co-operative society or the credit agency, as the case may be.

(3) Where more than one charge or mortgage had been created or executed as security for the financial assistance given as term loan for development purposes, the charges or mortgages shall have priority in accordance with the dates of their creation or execution.

Explanation.-For the purposes of this section, "term loan for development purposes" means financial assistance which would generally lead to improvement of agriculture and or building up of assets in agriculture but shall not include financial assistance for meeting working capital expenses, seasonal agricultural operations and marketing of crops.

(4) Nothing in this section shall apply to borrowings from one or more co-operative societies only.

Section 19 B : Burden of proof

Where validity of a mortgage or charge created under this Act is questioned in a court of law, notwithstanding anything contained in any law for the time being in force, the burden of proving that it was not created for agricultural or valid purposes shall be on the party alleging it.

MORTGAGE EXECUTED BY KARTA OF HUF

Under Section 8 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act,

1974.: Mortgage executed by managers of Joint Hindu Families

(1) Notwith-standing anything contained in any law, where a mortgage in respect of financial assistance given by a credit agency is executed by the agriculturist manager of a Joint Hindu Family, such mortgage shall, subject to the provision of sub-section (2) be binding on every member of such family.

(2) Whenever such mortgage is challenged on the ground that it was executed by the manager for a purpose not binding on the other members (whether such members have attained majority or not), the burden of proving the same shall be on party alleging it.

PROCEDURE AND MANDATORY TO REGISTER MORTGAGE AND DISCHARGE

Under Section 9 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act,

1974.: Registration of charges and mortgage in favour of a credit agency

(1) Notwithstanding anything contained in the Registration Act, 1908, a charge in respect of which a declaration has been made under clause (i) of section 6 or in respect of which variation has been made under clause (ii) of that section or a mortgage executed by an agriculturist in favour of a credit agency in

respect of financial assistance given by that credit agency, shall be deemed to have been duly registered in accordance with the provisions of that Act with effect from the date of such charge, variation or mortgage, as the case may be, provided the credit agency sends to the registering officer within the local limits of whose jurisdiction the whole or any part of the property charged or mortgaged is situate within such time and in such manner as may be prescribed by the State Government for this purpose, by registered post acknowledgment due, a copy of the document creating such charge, variation or mortgage duly certified to be a true copy by an employee of a credit agency authorised to sign on its behalf.

(2) The registering authority receiving such document shall enter the same in Book-I.

Section 10A : Registration of discharge certificates

Where any document creating a charge or mortgage has been registered in accordance with section 9 and the details thereof noted in the record of rights under section 10 and the liability under the financial assistance has been discharged, the credit agency shall issue a certificate to that effect and the provisions of the said sections shall, mutatis-mutandis, apply to the registration of such certificate and to the deletion of the entry made in the record of rights.

Section 15 : Exemption from registration fee

Notwithstanding anything contained in the Registration Act, 1908, no fee under the said Act shall

be payable in respect of an instrument by which immovable property is mortgaged or charged under this Act or by which it is released from such mortgage or charge.

ENTRY IN RTC MANDATION TO BE FOLLOWED BY CREDIT AGENCY

Under Section 10 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act, 1974.: Noting of charge or mortgage in the Record of Rights

Whenever a charge or a mortgage on land or interest therein is created or executed by an agriculturist in favour of a credit agency, the credit agency shall give intimation to the Tahsildar of the taluk in which the land is situated or to any officer authorised by him, of the particulars of the charge or mortgage in its favour. The Tahsildar or the officer authorised by him shall make a note of the particulars of charge or mortgage in the Record of Rights relating to the land over which the charge or mortgage has been created.

MONEY LENDERS ACT NOT APPLY

Under Section 18 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions

Act, 1974.: Money Lenders Act not to apply - The provisions of Karnataka Money Lenders Act, 1961 (Karnataka Act 12 of 1962) shall not apply to financial assistance granted to an agriculturist by a credit agency.

CREDIT AGENCY RIGHTS TO PURCHASE MORTGAGED IMMOVEABLE PROPERTY

Under Section 13 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act, 1974.: Right of a credit agency to purchase and dispose immoveable property

(1) Notwithstanding anything contained in any law for the time being in force, it shall be lawful for a credit agency to purchase agricultural land or interest therein or any other immoveable property which has been charged or mortgaged to it at a sale held in enforcement of the mortgage executed in its favour in respect of the financial assistance given when no person has offered to purchase it for a price which is sufficient to pay to the credit agency the moneys due to it and provisions of Chapter IV of the Karnataka Land Reforms Act, 1961 shall not be applicable in respect of the property so purchased.

(2) The property so purchased shall be disposed of by such credit agency by sale within a period of five years from the date of purchase.

(3) The sale by a credit agency of such property shall be subject to the provisions of the Karnataka Land

Reforms Act, 1961 and the Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1966.

(4) (a) The right of sale under sub-section (2) shall be subject to the condition that the credit agency shall give notice to the agriculturist referred to in sub-section (1) of section 12 that if he actually pays within the time specified in the notice which shall not be less than sixty days,-

(i) the amount specified in the proclamation of sale for the recovery of which the sale was ordered less any amount which may since the date of such proclamation of sale have been received by the credit agency towards such amount; and

(ii) such other sums including interest as may be prescribed.

(b) The credit agency shall specify in the notice the amount to be paid.

(c) If the agriculturist actually pays the amount in terms of the notice the credit agency shall reconvey the property to him at his cost.

Section 11 : Removal of bar to attachment and sale by process of court

Nothing in any law shall prevent in any manner a credit agency from causing any land or any interest therein mortgaged or charged to it by an agriculturist to secure any financial assistance, to be attached and sold through a civil court and applying the proceeds of such sale towards all moneys due to it from that

agriculturist including the costs and expenses as may be awarded by the court.

Section 12 : Recovery of dues of a credit agency on a certificate by the prescribed officer

(1) On an application made by a credit agency for the recovery of arrears of any sum due to it by an agriculturist towards the financial assistance given to him and on its furnishing a statement of accounts in respect of the arrears, the prescribed officer may after making such enquiries as he deems fit and after giving the agriculturist a reasonable opportunity of being heard, grant a certificate for the recovery of the amount stated therein to be due.

(2) A certificate by the prescribed officer under sub-section (1) shall be final and conclusive as to the arrears due. The arrears stated to be due therein shall be recoverable as if it were an arrear of land revenue.

Explanation- For the purposes of this section "agriculturist" includes his co-obligants and sureties and their legal representatives to the extent of assets of the deceased in their hands.

certificate by the prescribed officer under sub-section (1) shall be final and conclusive as to the arrears due. The arrears stated to be due therein shall be recoverable as if it were an arrear of land revenue

(3) The actual period during which any proceedings under this Act or rules made thereunder were pending shall be excluded while computing the period of limitation for filing a suit for the recovery of any

monies due in respect of financial assistance under this Act.

POWER OF CREDIT AGENCY TO LEASE LAND

Under Section 14 OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act, 1974.: Power to lease

Notwithstanding anything contained in any law for the time being in force a credit agency shall, subject to the provisions of sub-section (1) of section 13, have the right to lease the land acquired by it under the said sub-section :

Provided that the term of such lease shall not be more than one year at a time and that the lessee shall not acquire any interest in the land.

LIMITATION LAW APPLICABILITY

Under Section 19A OF Karnataka Agricultural Credit Operations and Miscellaneous Provisions Act, 1974.: Application of Indian Limitation Act, 1963

The provisions of sections 4, 5 and 15 of the Indian Limitation Act, 1963 (Central Act 36 of 1963) and articles 19, 21, 25, 36, 37, 38 and 62 of the Schedule to the said Act, shall apply mutatis-mutandis to all the proceedings under this Act and rules.

CHAPTER - 6

ENCUMBRANCE ON PROPERTY

WHAT IS MEANING OF WORD ENCUMBRANCE?

The meaning of „encumbrance“ has been considered in **Ai Champdany Industries Ltd. v. Official Liquidator, (2009) 4 SCC 486 (490)** in which the apex Court explained the meaning of the word „encumbrance“ to mean, "a burden or charge upon property or a claim or lien upon an estate or on the land."

In State of Himachal Pradesh v. Tarsem Singh, (2001) 8 SCC 104: AIR 2001 SC 3431, the apex Court further explained the meaning of „encumbrance“, which reads as follows: "Encumbrance" means a burden or charge upon property or claim or lien upon an estate or on the land. „Encumber“ means burden of legal liability on property, and, therefore, when there is encumbrance on a land, it constitutes a burden on the title, which diminishes the value of the land."

Smt.Sulochana Chandrakant Galande v. Pune Municipal Transport and Ors., reported in 2010 (8) SCC 467 Supreme Court, after considering the definition of the words, "vesting" in *Fruit & Vegetable Merchants Union v. The Delhi Improvement Trust* reported in AIR 1957 SC 344, "Encumbrance" in

Collector of Bomboy v. Nusserwanji Rattanji Mistri & Ors., reported in AIR 1955 SC 298, H.P. State Electricity Board & Ors., v. Shiv K. Sharma & Ors., reported in AIR 2005 SC 954, and Al Champdany Industries Ltd., v. Official Liquidator & Anr., reported in 2009 (4) SCC 486 and "free from all encumbrances" used in Section 16 of the Land Acquisition Act, 1894, explained in State of H.P., v. Tarsem Singh & Ors., reported in AIR 2001 SC 3431 and the catena of decisions on the point that the land vested in the State absolutely free from all encumbrances and it cannot be divested, at Paragraph 13, held that, "13. So far as the change of user is concerned, it is a settled legal proposition that once land vests in the State free from all encumbrances, there cannot be any rider on the power of the State Government to change user of the land in the manner it chooses."

In Satendra Prasad Jain v. State of U.P. (1993) 4 SCC 369, Court held that once land vests in the State free from all encumbrances, it cannot be divested. The same view has been reiterated in Awadh Bihari Yadav v. State of Bihar (1995) 6 SCC 31, U.P. Jal Nigam v. Kalra Properties (P) Ltd. (1996) 3 SCC 124, Pratap case (supra), Chandragauda Ramgonda Patil v. State of Maharashtra (1996) 6 SCC 405, Allahabad Development Authority v. Nasiruzzaman (1996) 6 SCC 424, State of Kerala v. M. Bhaskaran Pillai (1997) 5 SCC 432, M. Ramalinga Thevar v. State of T.N. (2000) 4 SCC 322, Printers (Mysore) Ltd. v. M.A. Rasheed

(2004) 4 SCC 460, Bangalore Development Authority v. R. Hanumaiah case (supra) and Govt. of A.P. v. Syed Akbar (2005) 1 SCC 558.

In Abdul Karim Khan and Ors. v. Managing Committee George High School AIR 1936 All. 879, Court held that encumbrance means a burden or charge upon property or a claim or lien upon State or on the land. It means a legal liability on property. Thus, it constitutes a burden on the title which diminishes the value of the land. So far as the provisions of the land acquisition are concerned, the word 'encumbrance' means therein is interest in respect of which compensation has been made or could have been claimed. It includes like a lease or a mortgage, securities, servitudes and trust etc.

The word "encumbrance" means a burden or charge upon property or a claim or lien upon an estate or on the land. "Encumber" means burden of legal liability on property, and, therefore, when there is encumbrance on a land, it constitutes a burden on the title which diminishes the value of the land.

In Abdul Karim Khan and others. vs. Managing Committee, George High School - AIR 1936 Allahabad 879, it was held that encumbrance would include easementary right of drainage over the land.

In Rashid Allidina vs. Jiwandas Khemji and another - AIR (30) 1943 Calcutta 35, it was laid down that the word 'encumbrance' has always been understood to include easementary right.

In Ganga Vishnu Swaika vs. Machine Manufacturing Co. Ltd and another- AIR 1955 Calcutta 503, it was ruled that an easementary right to discharge water on other's land comes within the meaning of encumbrance on the right in the land.

LANDS VESTED WITH GOVERNMENT FREE FROM ALL ENCUMBRANCES DOES NOT SNATCH AWAY COMMUNITY RIGHTS TO SEVERAL TYPE OF LANDS

Jitendra Singh vs. Ministry of Environment and Ors. (25.11.2019 - SC) : MANU/SC/1615/2019, It is clear that repeal of the UP Zamindari Abolition and Land Reforms Act, 1950 and vesting of such ponds and local areas in the State by Section 57 of the UP Revenue Code, 2006 would not by itself either change the nature of land contrary to revenue record nor will defeat the long-established rights of the local people on commons. Such a proposition had unequivocally been laid down in Chigurupati Venkata Subbayya v. Palaguda Anjayya (1972) 1 SCC 521, where this Court negated a contention that communal rights in the suit-land stood abolished per Section 3 of the Estates

Abolition Act, 1948 for it provided that estates, including communal lands, would stand transferred to the Government free from any encumbrance. Further, it was held that even explicit destruction of all rights and interests created by the principal or landholders, would not apply to community rights as such rights originated elsewhere.

In Hinch Lal Tiwari v. Kamala Devi (2001) 6 SCC 496, this Court settled that 'ponds' were a public utility meant for common use and held that they could not be allotted or commercialised. It had refused to give any weight to similar arguments of the pond having become levelled, with merely some portion getting covered during rainy season by water. Importantly, it emphasised that: "It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right Under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is the best protection

against knavish attempts to seek allotment in non-abadi sites."

Court reiterated in Jagpal Singh v. State of Punjab (2011) 11 SCC 396 and noted that since time immemorial, certain common lands had vested in village communities for collective benefit. Except in exceptional circumstances when used exclusively for the downtrodden, these lands were inalienable. It was observed that such protections, however, remained on paper, and since Independence powerful people and a corrupt system had appropriated these lands for personal aggrandisement. Pointing out the harms in allowing such misappropriation, the Court noted an urgent public interest in stopping such misdeeds. Further, various directions were issued for eviction of illegal occupants and restoration of the common land to villagers. It was explicitly specified that "long duration of such illegal occupation or huge expenditure in making constructions thereon" cannot be a "justification for condoning this illegal act or for regularising the illegal possession".

MC Mehta v. Union of India MANU/SC/0586/1988 : (1988) 1 SCC 471 wherein this Court mandated the State to ensure mandatory environmental education to all school students in pursuance of the fundamental duties enshrined in Article 51-A(g): 24. Having regard to the grave consequences of the

pollution of water and air and the need for protecting and improving the natural environment which is considered to be one of the fundamental duties under the Constitution (vide Clause (g) of Article 51A of the Constitution) we are of the view that it is the duty of the Central Government to direct all the educational institutions throughout India to teach atleast for one hour in a week lessons relating to the protection and the improvement of the natural environment including forests, lakes, rivers and wildlife in the first ten classes. The Central Government shall get text books written for the said purpose and distribute them to the educational institutions free of cost. Children should be taught about the need for maintaining cleanliness commencing with the cleanliness of the house both inside and outside, and of the streets in which they live. Clean surroundings lead to healthy body and healthy mind. Training of teachers who teach this subject by the introduction of short term courses for such training shall also be considered. This should be done throughout India.

The State of Madhya Pradesh vs. Sabal Singh (dead)

By Lrs. and Ors. MANU/SC/1405/2019 - 2019 (13)

SCALE 689 Zamindari Abolition Act and that of Bhumiswami under the provisions of Section 158 of Madhya Pradesh Land Revenue Code, 1959 (hereafter referred to as "M.P. Land Revenue Code, 1959").

The Zamindari system came to be abolished on 2.10.1951 in the erstwhile State of Madhya Bharat.

The Zamindari Abolition Act, had been reserved Under Article 31(4) of the Constitution of India for the consideration of the Hon'ble President and received his assent in 1951 and was enforced with effect from 2.10.1951, resulting into the abolition of intermediaries. The same was enacted for the public purpose of the improvement of agriculture, and financial condition of agriculturist by abolition and acquisition of rights of proprietors in the village, muhals, chak or blocks settled on Zamindari system which used to be a system of keeping an intermediary between the State and the tenants.Section 3 of the Zamindari Abolition Act provided for vesting of proprietary rights in the State, and the rights of the proprietor shall pass from such proprietor to such other person, to and vests in the State free of all encumbrances. Section 4 provided for the consequence of the vesting of an estate in the State. As per Section 4(1)(a) all rights, title and interest of the proprietor in such area, including land (cultivable, barren or Bir), forest, trees, fisheries, wells (other than private wells), tanks, ponds, water channels, ferries, pathways village-sites, hats, and bazaars and mela-grounds and in all sub-soil, including rights, if any, in mines and minerals, whether being worked or not shall cease and be vested in the State free from all encumbrances automatically. Section 4(2) contains saving in favour of the proprietor to the extent that he shall continue to remain in possession of his Khud-kasht land so recorded in the annual village papers on

the date of vesting. Section 2(c) defines the 'Khud-kasht' to mean land personally cultivated by Zamindars or through employees or hired labourers and includes sir land. Bir land is vested in State Under Section 4(1). The grass is naturally grown without effort, and it cannot be said to be produced by way of rendering one's labour or through employees or hired labour. The land should have been under Khud-kasht i.e., personal cultivation and so recorded of the ex-proprietor to be saved from vesting as statutorily mandated. There is a specific provision in Section 4(1) of the Abolition Act that the grassland, i.e., 'Bir land,' held by the proprietor automatically vested in the State free from all encumbrances. In which case land lying fallow also vested in the State.

ENCUMBRANCE OF AUCTION PURCHASER

Saraswati Devi (D) by L.Rs. vs. Delhi Devt. Authority and Ors. AIR 2013 SC 1717

37. In P. Ramanatha Aiyar's The Law Lexicon [Second Edition Reprint 2000] with reference to a decision of the Patna High Court in Mahadeo Prasad Sahu v. Gajadhar Prasad Sahu AIR 1924 Patna 362, the term "encumbrance" is explained as follows: Encumbrance. Burden or property; impediment; mortgage or other claim on property. Grant of lands rent free or the grant of the landlords zarait land to a tenant for the purposes of cultivation does amount to an encumbrance of the estate. Apart from mere dealings

such as mortgages which create a charge upon the land, there are other dealings which amount to an encumbrance. Anything which interferes with the unrestricted rights of the proprietors as they then existed would be an encumbrance upon the land, even the granting of a lease of zarait lands, that is to say the lands which the landlord is entitled to hold in direct possession and to cultivate for his own purposes. A lease of such lands granted to an occupier in circumstances which would give him a right of occupancy over the land, would amount to an encumbrance.

38. In *Collector of Bombay v. Nusserwanji Rattanji Mistri and Ors.* AIR 1955 SC 298, the term "encumbrance" as occurring in Section 16 of the LA Act has been explained by this Court to mean interests in respect of which a compensation was made Under Section 11 or could have been claimed thereunder.

39. In *M. Ratanchand Chordia and Ors. v. Kasim Khaleeli* AIR 1964 Madras 209, a Division Bench of the Madras High Court had an occasion to consider the meaning of the word "encumbrances" with reference to the 1954 Act and the LA Act in the context of the easementary right of way. The Division Bench considered the word "encumbrances" thus:

18. The word "Encumbrances" in regard to a person or an estate denotes a burden which ordinarily consists of debts, obligations and responsibilities. In the sphere of law it connotes a liability attached to the

property arising out of a claim or lien subsisting in favour of a person who is not the owner of the property. Thus a mortgage, a charge and vendor's lien are all instances of encumbrances. The essence of an encumbrance is that it must bear upon the property directly and in-directly and not remotely or circuitously. It is a right in re aliena circumscribing and subtracting from the general proprietary right of another person. An encumbered right, that is a right subject to a limitation, is called servient while the encumbrance itself is designated as dominant....

40. The word "encumbrance", according to its ordinary significance, means any right existing in another to use the land or whereby the use by the owner is restricted. The word "encumbrance" imports within itself every right or interest in the land, which may subsist in a person other than the owner; it is anything which places the burden of a legal liability upon property. The word "encumbrance" in law has to be understood in the context of the provision under consideration but ordinarily its ambit and scope is wide. Seen thus, it is difficult to see why a binding contract entered into between an auction-purchaser and the government on approval of the highest bid relating to sale of property, which is part of compensation pool Under Section 14 of the 1954 Act followed by provisional possession to the auction-purchaser, should not come within the purview of the word "encumbrance".

41. It is well known in law that a person in possession of the property-though not owner-is entitled to certain rights by virtue of his possession alone. We are in agreement with the view of the Punjab High Court in Roshan Lal Goswami AIR (1963) Punjab 532 that an auction-purchaser on provisional possession being given to him possesses possessory rights, though he does not have proprietary rights in the auctioned property. Thus, there remains no doubt that in October, 1960 or near about encumbrance in the subject property came to be created.

MERE MOU TO SELL IS NOT ENCUMBRANCE

Saradamani Kandappan and Ors. vs. S. Rajalakshmi and Ors. AIR 2011 SC 3234

An 'encumbrance' is a charge or burden created by transfer of any interest in a property. It is a liability attached to the property that runs with the land. [See National Textile Corporation v. State of Maharashtra AIR 1977 SC 1566 and State of H.P. v. Tarsem Singh 2001 (8) SCC 104]. Mere execution of an MOU, agreeing to enter into an agreement to sell the property, does not amount to encumbering a property. Receiving advances or amounts in pursuance of an MOU would not also amount to creating an encumbrance.

Municipal Tax due against company does not create any encumbrance on the property and consider as personal liability.

AI Champdany Industries Limited vs. The Official Liquidator and Ors. 2009 (2) SCR 705

The word 'encumbrance' in relation to the word 'immovable property' carries a distinct meaning. It ordinarily cannot be assigned a general and/or dictionary meaning. We may however notice some dictionary meanings of the said word as reliance thereupon has been placed by Mr. Sibaji Sen.

In Stroud's Judicial Dictionary of Words and Phrases 5th Edition Encumbrance is defined as "being, 'a claim, lien, or liability, attached to property'; and this definition is wide enough to cover the plaintiff's claim," which was, as assignee for value of a reversionary interest, against a person coming in under a subsequent title."

In Supreme Court on Words and Phrases it is stated that "the word 'encumbrance' means a burden or charge upon property or a claim or lien upon an estate or on the land."

In Advanced Law Lexicon Encumbrance is defined as "an infringement of another's right or intrusion on another's property."

In Black's Law Dictionary Encumbrance is defined as "any right to, or interest in, land which may subsist in

another to diminution of its value, but consistent with the passing of the fee."

13. Encumbrance, therefore, must be capable of being found out either on inspection of the land or the office of Registrar or a statutory authority. A charge, burden or any other thing which impairs the use of the land or depreciates in its value may be a mortgage or a deed of trust or a lien or an easement. Encumbrance thus must be a charge on the property. It must run with the property. If by a reason of the statute no such burden on the title which diminishes the value of the land is created, it shall not constitute any encumbrance.

14. If the property tax was merely a statutory dues without creating any encumbrance on the property which had cast a duty upon all the auction purchasers to make an investigation, it would mean that he must try to find out all the liabilities of the company in liquidation in their entirety. Respondent-Municipality was an unsecured creditor. In that capacity it cannot stand on a higher footing than an ordinary unsecured creditor who is required to stand in queue with all others similarly situated for the purpose of realization of their dues from the sale proceeds.

WHEN LAND VESTED WITH GOVERNMENT IT DIVEST EASEMENTARY RIGHTS ALSO

State of Himachal Pradesh vs. Tarsem Singh and Ors. AIR 2001 SC 3431 Section 3 of Himachal Pradesh Village Common Lands Vesting and

Utilization Act, 1974 - when Legislation has used expression 'free from encumbrances' it means vesting of land is without any burden or charge on land - consequences of vesting of rights in land free from all encumbrances is that interest, rights and title to land including easementary right stood extinguished and such rights vested in State free from all encumbrances.

FORFIETURE PROCEEDINGS UNDER SAFEMA - EVEN ENCUMBRANCE VERIFICATION NO VALUE

Winston Tan and Ors. vs. Union of India (UOI) and Ors. AIR 2013 SC 604 - Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976, to be referred as 'SAFEMA' - It is true that the Appellants had obtained encumbrances certificates from the Sub-Registrar prior to purchase which show that there were no encumbrances to the subject flat. It is also true that the Appellants had obtained loan from Vijaya Bank, Brigade Road Branch, Bangalore for purchase of the said flat. It is a fact that sale consideration to the tune of Rs. 26 lakhs were paid directly by the Bank to the vendors after the Bank was satisfied about the title of the vendors. The Appellants had also mortgaged the flat with the Vijaya Bank as a security towards loan. But unfortunately, these facts are of no help to the Appellants as the sale in their favour was effected after notices Under Section 6(1)

were issued to the vendors. Such sale has no legal sanction. The sale is null and void on the face of Section 11; it is not protected so as to enable the purchaser to prove that he is transferee in good faith for adequate consideration. As a matter of law, no title came to be vested in the Appellants by virtue of sale-deed dated 10.02.2005 as the vendors could not have transferred the property after service of the notice Under Section 6(1) and during pendency of forfeiture proceedings under SAFEMA.

CONSEQUENCES OF TENANT IN FINANCED PROPERTY

Vishal N. Kalsaria vs. Bank of India and Ors. 2016 (3) SCC 762 : MANU/SC/0061/2016 (DB)

Facts of the case:- Landlord had approached the Bank for a financial loan, which was granted against equitable mortgage of several properties belonging to them, including the property in which the Appellant is allegedly a tenant. The landlords failed to pay the dues within the stipulated time and thus, in terms of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), their account became a non-performing asset.

On 12.03.2010, the Respondent-Bank served notice on landlords Under Section 13(2) of SARFAESI Act. On failure of the landlords to clear the dues from the loan amount borrowed by the landlords within the

stipulated statutory period of 60 days, the Bank filed an application before the Chief Metropolitan Magistrate, Mumbai Under Section 14 of the SARFAESI Act for seeking possession of the mortgaged properties which are in actual possession of the tenant. The learned Chief Metropolitan Magistrate allowed the application filed by the Bank and directed the Assistant Registrar, of Court to take possession of the secured assets. On 26.05.2011, the landlord served a notice on the tenant, asking him to vacate the premises in which he was residing within 12 days from the receipt of the notice.

The tenant fearing eviction, filed a Rent Suit before the Court of Small Causes, Bombay. Vide order dated 08.06.2011, the Small Causes Court allowed the application and passed an ad interim order of injunction in favour of the tenant, restraining landlord from obstructing the possession of the tenant over the suit premises during the pendency of the suit. In view of the order dated 08.06.2011, the tenant then filed an application as an intervenor to stay the execution of the order dated 08.04.2011 passed by the Chief Metropolitan Magistrate. The learned Chief Metropolitan Magistrate vide order dated 29.11.2014 dismissed the application filed by the tenant by placing reliance on a judgment of Supreme Court rendered in the case of Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. and Ors. MANU/SC/0377/2014 : (2014) 6 SCC 1;

The learned Chief Metropolitan Magistrate further held that when the secured creditor takes action Under Section 13 or 14 of the SARFAESI Act to recover the possession of the secured interest and recover the loan amount by selling the same in public auction, then it is not open for the Court to grant an injunction Under Section 33 of the Rent Control Act. The learned Chief Metropolitan Magistrate further held that the order dated 08.06.2011 passed by the Small Causes Court, Mumbai cannot be said to be binding upon the Bank, especially in the light of the fact that it was not a party to the proceedings. Matter went to High court in vain and then appeal is filed before Supreme court by tenant.

In Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. and Ors. MANU/SC/0377/2014 : (2014) 6 SCC 1. Dismissing the application, the learned judge held as under: 3....the Hon'ble Supreme Court has held that the alleged tenant has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the

instrument or from the date of delivery of possession in his favour by the landlord.

But in the above case it is discussed and held as follows:-

1. The SARFAESI Act, which came into force from 21.06.2002, was enacted to provide procedures to the Banks to recover their security interest from the debtors and their collateral security assets as provided under the provisions of the Act.
2. It becomes clear that the SARFAESI Act is meant to operate as a tool for banks and ensures a smooth debt recovery process. Providing a smooth and efficient recovery procedure to enable the banks to recover the Non Performing Assets is a laudable object indeed, which needs to be ensured for the development of the economy of the Country.
3. What has complicated the matters, however, is the clash of this laudable object with another laudable object, namely, to secure the rights of the tenants under the various Rent Control Acts. Rent Control Acts have been enacted by the different state legislatures to secure the rights of the weaker sections of the society, viz., the tenants.
4. It becomes clear from a perusal of the Rent Control Act that the ultimate object behind the enactment of this legislation is to control and regulate the rate of rent so that unnecessary hardship is not caused to the tenant, and also to provide protection to the tenants against arbitrary and unreasonable evictions from the possession of the property.

5. There is an interest of the bank in recovering the Non Performing Asset on the one hand, and protecting the right of the blameless tenant on the other.

6. A landlord cannot be permitted to do indirectly what he has been barred from doing under the Rent Control Act, more so when the two legislations, that is the SARFAESI Act and the Rent Control Act operate in completely different fields.

7. The provisions of the SARFAESI Act cannot be used to override the provisions of the Rent Control Act.

8. If the contentions of the learned Counsel for the Respondent Banks are to be accepted, it would render the entire scheme of all Rent Control Acts operating in the country as useless and nugatory. Tenants would be left wholly to the mercy of their landlords and in the fear that the landlord may use the tenanted premises as a security interest while taking a loan from a bank and subsequently default on it. Conversely, a landlord would simply have to give up the tenanted premises as a security interest to the creditor banks while he is still getting rent for the same.

9. In case of default of the loan, the maximum brunt will be borne by the unsuspecting tenant, who would be evicted from the possession of the tenanted property by the Bank under the provisions of the SARFAESI Act. **Under no circumstances can this be permitted, more so in view of the statutory protections to the tenants under the Rent Control**

Act and also in respect of contractual tenants along with the possession of their properties which shall be obtained with due process of law.

10. The issue of determination of tenancy is also one which is well settled. While Section 106 of the Transfer of Property Act, 1882 does provide for registration of leases which are created on a year to year basis, what needs to be remembered is the effect of non-registration, or the creation of tenancy by way of an oral agreement. According to Section 106 of the Transfer of Property Act, 1882, a monthly tenancy shall be deemed to be a tenancy from month to month and must be registered if it is reduced into writing. The Transfer of Property Act, however, remains silent on the position of law in cases where the agreement is not reduced into writing.

11. If the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is being paid and accepted, then the **mere factum of non-registration of deed will not make the lease itself nugatory.**

12. **If no written lease deed exists**, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings

13. Under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the special law in the instant case, which is the Rent Control Act, **the onus to get such a deed registered is on the landlord.** In light of the same, neither the

landlord nor the banks can be permitted to exploit the fact of non registration of the tenancy deed against the tenant.

14. It is a well settled position of law that a word or sentence cannot be picked up from a judgment to construe that it is the ratio decidendi on the relevant aspect of the case. It is also a well settled position of law that a judgment cannot be read as a statute and interpreted and applied to fact situations.

15. The decision of this Court rendered in the case of Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. and Ors. cannot be understood to have held that the provisions of the SARFAESI Act override the provisions of the Rent Control Act, and that the Banks are at liberty to evict the tenants residing in the tenanted premises which have been offered as collateral securities for loans on which default has been done by the debtor/landlord.

16. **As far as granting leasehold rights being created after the property has been mortgaged to the bank, the consent of the creditor needs to be taken.** The Court has already taken this view in the case of Harshad Govardhan Sondagar v. International Assets Reconstruction Co. Ltd. and Ors.

17. The Court has not stated anything to the effect that the tenancy created after mortgaging the property must necessarily be registered under the provisions of the Registration Act and the Stamp Act.

18. It is a settled position of law that once tenancy is created, a tenant can be evicted only after following

the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant.

19. A non obstante Clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested on the tenants under the Rent Control Act. The expression 'any other law for the time being in force' as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State legislatures. It can only extend to the laws operating in the same field.

20. If the interpretation of the provisions of SARFAESI Act as submitted by the learned senior Counsel appearing on behalf of the Banks is accepted, it would not only tantamount to violation of rule of law, but would also render a valid Rent Control statute enacted by the State Legislature in exercise of its legislative power Under Article 246(2) of the Constitution of India useless and nugatory. The Constitution of India envisages a federal feature, which has been held to be a basic feature of the Constitution.

21. In view of the above legal position, if the Court accepts the legal submissions made on behalf of the Banks to hold that the provisions of SARFAESI Act override the provisions of the various Rent Control Acts to allow a Bank to evict a tenant from the tenanted premise, which has become a secured asset

of the Bank after the default on loan by the landlord and dispense with the procedure laid down under the provisions of the various Rent Control Acts and the law laid down by this Court in catena of cases, then the legislative powers of the state legislatures are denuded which would amount to subverting the law enacted by the State Legislature. Surely, such a situation was not contemplated by the Parliament while enacting the SARFAESI Act and therefore the interpretation sought to be made by the learned Counsel appearing on behalf of the Banks cannot be accepted by this Court as the same is wholly untenable in law.

22. In view of the foregoing, the impugned judgments and orders passed by the High Court/Chief Metropolitan Magistrate are set aside and the appeals are allowed.

23. The Court further directed that the amounts which are in deposit pursuant to the conditional interim order of this Court towards rent either before the Chief Metropolitan Magistrate/Magistrate Court or with the concerned Banks, shall be adjusted by the concerned Banks towards the debt due from the debtors/landlords in respect of the Appellants in these appeals.

24. The enhanced rent by way of conditional interim order shall be continued to be paid to the respective Banks, which amount shall also be adjusted towards debts of the debtors/landlords.

THE OPERATION OF RENT ACT DOES NOT EXTEND TO TENANT IN SUFFERANCE

Bajarang Shyamsunder Agarwal vs. Central Bank of India and Ors.: 2019 (9) SCC 94 - MANU/SC/1248/2019 (Three Judge Bench) -

"Tenant at sufferance is one who comes into possession of land by lawful title, but who holds it, by wrong after the termination of the term or expiry of the lease by efflux of time. The tenant at sufferance is, therefore, one who wrongfully continues in possession after the extinction of a lawful title. There is little difference between him and a trespasser."¹

Facts:- The tenant received a legal notice from borrower/landlord directing the tenant to vacate the premises. The tenant preferred a suit before the Court of Small Causes. The Small Causes Court allowed the application for interim injunction of the tenant filed in the suit and borrower/landlord was restrained from disturbing the possession of the tenant. The tenant preferred an application before the Chief Metropolitan Magistrate. By the impugned order, the Chief Metropolitan Magistrate after hearing the tenant, rejected the application holding that the tenant being a tenant without any registered instrument was not entitled for the possession of the

¹ R.V. Bhupal Prasad v. State of A.P. and Ors. MANU/SC/0035/1996 : AIR 1996 SC 140,

secured asset for more than one year from the date of execution of unregistered tenancy agreement.

Held:-

1. The bona fides of the tenant was highly doubtful, as there was no good or sufficient evidence to establish the tenancy in the first place.
2. The present case involves a tenant who allegedly entered into an oral agreement of tenancy before the mortgage deed was entered into between the borrower and Bank/Creditor.
3. Additionally, it must be noted that tenancy created under such an oral agreement, results in a fresh tenancy after the expiry of statutory period fixed under the T.P. Act.
4. The records also did not demonstrate that the Appellant-tenant has been able to prove his status as a valid leaseholder to merit the protection sought for.
5. However, the date of creation of the tenancy was not established in the present case.
6. It was pertinent to note that at the time when the SARFAESI Act proceedings were pending, the factum of tenancy was never revealed by the parties.
7. It was only after passing of the order of the Chief Metropolitan Magistrate, that the tenant started agitating his rights before the Small Causes Court based on a completely different fact scenario, without a whisper of the alleged tenancy under the concluded Section 14, SARFAESI Act proceedings.
8. The borrower/landlord did not even respond to the claims of the tenant.

9. The bank had produced multiple records to substantiate their claim that the tenant was nowhere to be seen earlier and that this tenancy was created just to defeat the proceedings initiated under the SARFAESI Act.

10. On the contrary, the tenant had failed to produce any evidence to substantiate his claim over the secured asset.

11. In such a situation, the Appellant-tenant could not claim protection under the garb of the interim protection granted to him, ex parte, by solely relying upon the xerox of the rent receipts.

12. The operation of the Rent Act could not be extended to a tenant-in-sufferance vis-a-vis the SARFAESI Act, due to the operation of Section 13(2) read with Section 13(13) of the SARFAESI Act.

13. A contrary interpretation would violate the intention of the legislature to provide for Section 13(13) of Act, which had a valuable role in making the SARFAESI Act a self-executory instrument for debt recovery.

14. Moreover, such an interpretation would also violate the mandate of Section 35 of SARFAESI Act which was couched in broad terms.

15. This case, did not mandate the additional protection to be provided under the Rent Act, to the tenant. The lower Courts were correct in ordering delivery of possession to the bank as the tenancy stands determined.

TENANT CANNOT APPROACH CIVIL COURT HIS REMEDY IS BEFORE DRT COURT

Central Bank of India and Ors. vs. Umesh M.S.:

MANU/KA/8726/2019 - Sub-Section 4(A) to Section

17 SARFAESI Act was inserted by amendment Act 44 of 2016 by notification dated 01.09.2016. Sub-Section

4A reads as follows: (4A) Where- i) any person, in an application under sub-section (1), **claim any tenancy**

or leasehold rights upon the secured asset, the

Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy-

a) has expired or stood determined; or

b) is contrary to section 65A of the Transfer of Property Act, 1882; or

c) is contrary to terms of mortgage; or

d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act, and

ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i). Then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of the Act.

By virtue of insertion of the above provision, the DRT is empowered to examine, any claim of tenancy or leasehold rights upon the secured assets. Therefore, in the facts and circumstances of the present case, as the plaintiff claims to be a tenant his remedy is to approach the Debts Recovery Tribunal. It is always open for the plaintiff to approach the DRT under Section 17 of the SARFAESI Act. As already noticed above, from the averments made at paragraphs 1 to 3 of the plaint, it is clear that the plaintiff was aware of the action initiated by defendants 2 and 3/Bank under SARFAESI Act and as such, the plaintiff could not have maintained the suit before the Civil Court praying for permanent injunction, as the same is barred under Section 34 of the SARFAESI Act. Hence, I am of the opinion that the suit would not be maintainable and the plaint is liable to be rejected.

PURCHASE WITHOUT CHECKING ENCUMBRANCE

MANU/DE/0789/2016 [Loveleen Kaur & Anr. Vs. ICICI Bank Ltd., & Ors.] wherein the Division Bench of Delhi High Court held as follows: "...11. For example, in the instance case, if the gift deed by Smt. Shakuntla Devi in favour of her son precedes the sale-deed executed by her in favour of the petitioners, upon the fact that the gift deed is registered, would be proof of the fact that the petitioners cannot claim to be bona-fide purchasers for valuable consideration of the

second floor, for the reason they were negligent in not carrying out a title search in the records of the Sub-Registrar."

CHAPTER - 7

AUCTION SALE AND ALLIED ASPECTS

SALE OF SECURED ASSETS

In Mathew Varghese v. M. Amritha Kumar [MANU/SC/0114/2014 : (2014) 5 SCC 610], the Hon'ble Supreme Court laid down the detailed guidelines about the sale of secured assets by the secured creditor under the provisions of the SARFAESI Act, 2002 vis-a-vis Recovery of Debts Due to Banks and Financial Institutions Act, 1993. It was held inter alia, by the Supreme Court that the compliance with Rule 8(1) to (3) of SARFAESI Rules, 2002 was mandatory and therefore, giving minimum time of 30 days notice for sale was necessary.

Paragraphs 31 and 35 of the said judgment of the Supreme Court are quoted below for ready reference:

"31. At this juncture, it will also be worthwhile to refer to Rules 8(1) to (3) and in particular sub-rule (3), in order to note the responsibility of the secured creditor vis-a-vis the secured asset taken possession of. Under sub-rule (1) of Rule 8, the prescribed manner in which the possession is to be taken by issuing the notice in the format in which such notice of possession is to be issued to the borrower is stipulated. Under sub-rule (2) of Rule 8 again, it is stated as to how the secured creditor should publish the notice of possession as prescribed under sub-rule (1) to be made in two leading newspapers, one of which should be in the vernacular language having sufficient circulation in

the locality and also such publication should have been made seven days prior to the intention of taking possession. Sub-rule (3) of Rule 8 really casts much more onerous responsibility on the secured creditor once possession is actually taken by its authorised officer. Under sub-rule (3) of Rule 8, the property taken possession of by the secured creditor should be kept in its custody or in the custody of a person authorized or appointed by it and it is stipulated that such person holding possession should take as much care of the property in its custody as a owner of ordinary prudence would under similar circumstances take care of such property. The underlining purport of such a requirement is to ensure that under no circumstances, the rights of the owner till such right is transferred in the manner known to law is infringed. Merely because the provisions of the SARFAESI Act and the Rules enable the secured creditor to take possession of such an immovable property belonging to the owner and also empowers to deal with it by way of sale or transfer for the purpose of realizing the secured debt of the borrower, it does not mean that such wide power can be exercised arbitrarily or whimsically to the utter disadvantage of the borrower.

32. Under sub-rule (4) of Rule 8, it is further stipulated that the authorized officer should take steps for preservation and protection of secured assets and insure them if necessary till they are sold or otherwise disposed of. Sub-rule (4), governs all

secured assets, movable or immovable and a further responsibility is created on the authorised officer to take steps for the preservation and protection of secured assets and for that purpose can even insure such assets, until it is sold or otherwise disposed of. Therefore, a reading of Rules 8 and 9, in particular, sub-rule (1) to (4) and (6) of Rule 8 and sub-rule (1) of Rule 9 makes it clear that simply because a secured interest in a secured asset is created by the borrower in favour of the secured creditor, the said asset in the event of the same having become a non-performing asset cannot be dealt with in a light-hearted manner by way of sale or transfer or disposed of in a casual manner or by not adhering to the prescriptions contained under the SARFAESI Act and the abovesaid Rules mentioned by us.

Ramco Super Leathers Ltd. v. UCO Bank [MANU/TN/8857/2007 : (2007) 5 MLJ 986], has held that the powers under Section 17 of the DRT includes the power of the Tribunal to restore possession in favour of the borrower, if action taken under Section 13(4) of the Act is declared invalid and merely because a secured creditor has taken possession and Sale Certificate in favour of one or other has been issued, it will not render the Tribunal powerless to restore the possession in favour of the Borrower.

"13. From a plain reading of Sub-section (1) to Section 17, it will be evident that a person, including

borrower, could make an application under Section 17 to the DRT, if aggrieved by any of the measures referred to in Subsection (4) to Section 13 as taken by the secured creditor. That means, only if one or other measure is taken by the secured creditor, a cause of action arises for any person or the borrower to prefer appeal (application) under Section 17. Under Subsection (2), the Tribunal is bound to consider whether any of the measures referred to under Sub-section (4) to Section 13 taken by the secured creditors are in accordance with the provisions of this Act. Under Sub-section (3) to Section 17, after examining the facts and circumstances of the case, and evidence produced by the parties, if the Tribunal comes to a conclusion that any of the measures referred to under Sub-section (4) to Section 13 taken by the secured creditor are not in accordance with the provisions of the Act and the rules and require restoration of the management of the business to the borrower, or restoration of possession of the secured assets to the borrower, it may declare such action as invalid and restore possession of secured assets to the borrower or restore the management of the business to the borrower, as the case may be.

From the aforesaid Section 17, it will be evident that any person, including borrower, could file an appeal (application) under Section 17 at any stage, including the stage when management of business is taken or possession of secured assets of the borrower, including right to transfer is taken over by the secured

creditor. In such case, the Tribunal has power to restore possession in favour of the borrower, if such action taken under Sub-section (4) to Section 13 is declared invalid. Merely because a secured creditor has taken possession of secured asset, or issued notice inviting application for sale of secured asset, or issued a sale certificate in favour of one or other auction purchaser, will not render the Tribunal powerless to restore possession in favour of the borrower, if such action taken under Subsection (4) to Section 13 is found not in accordance with the Acts and the Rules framed thereunder, and is declared invalid."

Supreme Court, in the case of Shakeena v. Bank of India [MANU/SC/1119/2019], held on the facts of the case that the registration of the Sale Certificate issued by the Bank was not necessary and in the facts of that case, the right of redemption of Borrower stood closed on the issuance of the Sale Certificate.

"33. Reverting to the stand taken by the appellants that they had attempted to exercise their right of redemption by depositing an aggregate sum of Rupees Twenty Five Lacs on 30th December, 2005 and 4th January, 2006, in the account of the father of appellant No. 2 followed by issuing cheque(s) in the aggregate sum of Rs. 25,21,446/- (Rupees Twenty Five Lacs Twenty One Thousand Four Hundred Forty Six Only), on 2nd January, 2006; and once again offering the amount by demand drafts in the sum of

Rs. 25,06,250/- (Rupees Twenty Five Lacs Six Thousand Two Hundred Fifty Only), on 18th January, 2006. This stand though attractive at the first blush, will have to be stated to be rejected. On the other hand, we find substance in the stand taken by the respondent bank that none of the above was a valid tender so as to extricate or discharge the appellants from their obligation-to deposit the outstanding dues payable by them before the specified date. In that, the amount was allegedly deposited by them in the account of the father of appellant No. 2 and not in their loan accounts as such. Unless the amount was transferred/deposited in the loan accounts of the appellants in relation to which the mortgage operated, it would not be a valid tender for paying the outstanding dues. Similarly, on the second occasion the appellants attempted to pay in the form of cheque(s) issued on 2nd January, 2006. However, as per the terms and conditions for grant of loan payment by cheque(s) was not permissible. Thus, the respondent bank was not obliged to accept the amount in the form of cheque(s). The respondent bank, therefore, justly declined to accept the cheque(s), not being a valid tender. Even the third attempt made by the appellants was to offer demand drafts drawn in favour of or in the name of the Authorised Officer of the respondent bank and not in the name of the bank or authorising the bank to appropriate it towards the subject loan accounts.

Hence, these demand drafts were rightly not accepted as a valid tender.

34. Notably, the appellants took no steps, whatsoever, to pay the outstanding dues to the respondent bank by way of a valid tender nor moved any formal application before the High Court after filing of the writ petitions on 19 January, 2006, to permit them to deposit the requisite amount either in the concerned loan accounts or in the court. That was not done even until the disposal of the writ petitions by the Single Judge or during the pendency of the writ appeals before the Division Bench and until the disposal thereof vide the impugned judgment. (Belated effort to pay by borrower). We must also notice the stand taken by the respondent bank that even the legal notice sent by the appellants to the respondent bank, in no way expresses unambiguous commitment of the appellants to exercise their right of redemption. Suffice it to observe that the appellants, for reasons best known to them, have not chosen to deposit the amount in the loan accounts or attempted to seek permission of the Court to deposit the same in Court from 19th January, 2006 immediately after filing of writ petitions or for that matter until the registration of the sale certificate on 18th September, 2007. In this backdrop, it is not possible to countenance the stand of the appellants that they had made a valid tender to the respondent bank or that the respondent bank had mischievously or malafide rejected their offer to defeat their rights, to redeem the mortgage before

registration of the sale certificate on 18th September, 2007.

35. A fortiori, it must follow that the appellants have failed to exercise their right of redemption in the manner known to law, much less until the registration of the sale certificate on 18th September, 2007. In that view of the matter no relief can be granted to the appellants, assuming that the appellants are right in contending that as per the applicable provision at the relevant time (unamended Section 13(8) of the 2002 Act), they could have exercised their right of redemption until the registration of the sale certificate-which, indisputably, has already happened on 18th September, 2007. Therefore, it is not possible to countenance the plea of the appellants to reopen the entire auction process. This is more so because, the narrative of the appellants that they had made a valid tender towards the subject loan accounts before registration of the sale certificate, has been found to be tenuous. Thus understood, their right of redemption in any case stood obliterated on 18th September, 2007. Further, the amended Section 13(8) of the 2002 Act which has come into force w.e.f. 1st September, 2016, will now stare at the face of the appellants. As per the amended provision, stringent condition has been stipulated that the tender of dues to the secured creditor together with all costs, charges and expenses incurred by him shall be at any time before the "date of publication of notice" for public auction or inviting quotations or tender from public or

private deed for transfer by way of lease assessment or sale of the secured assets. That event happened before the institution of the subject writ petitions by the appellants.

36. Having said thus, in the peculiar facts of the present case, we do not deem it necessary to dilate further on the argument that registration of the sale certificate in relation to the auction conducted under the 2002 Act is essential. Similarly, it is not necessary to examine other grounds urged by the appellants, in light of our conclusion that the appellants have failed to make a valid and legal tender to the respondent bank before the issue of sale certificate on 6th January, 2006, much less registration thereof on 18th September, 2007."

SETTING ASIDE AUCTION SALE

In FCS Software Solutions Ltd. v. La Medical Devices Ltd. and Ors. MANU/SC/7803/2008 : (2008) 10 SCC 440, Court considered a case where after confirmation of auction sale it was found that valuation of movable and immovable properties, fixation of reserve price, inventory of Plant and Machineries had not been made in proclamation of sale, nor disclosed at time of sale notice. Therefore, in such a fact-situation, the sale was set aside after its confirmation.

Amanbi and Ors. vs. Rasulsaheb Nabisaheb Nawaz : MANU/KA/0185/2005 - 2005 (3) KCCR 1819 -

Section 176 of the Karnataka Land Revenue Act is in Pari Materia with Order 21 Rule 92 of the CPC-Both are almost identical in respect of the debtor's right to seek setting aside sale-sale can be set aside on the grounds of material irregularity, mistake or fraud is committed, which has resulted in loss of injury to the interested person or in the alternate the interested person depositing with the Deputy Commissioner. The amount of arrears for which the property was brought to sale-The Deputy Commissioner has to hold summary enquiry in this regard to set aside the sale or to direct fresh sale-on facts, Held:- The defendant has not made any application with in the time prescribed for setting aside the sale. Therefore it is not open for the defendant to say that the sale was accentuated by misrepresentation.

Radhy Shyam v. Shyam Behari Singh MANU/SC /0024/1970 : AIR 1971 SC 2337.

7. There can be no doubt that an application under Order XXI, Rule 90 to set aside an auction-sale concerns the rights of a person declared to be the purchaser. If the application is allowed, the sale is set aside and the purchaser is deprived of his right to have the sale confirmed by the Court under Rule 92. Such a right is a valuable right, in that, upon such confirmation the sale becomes absolute and the rights of ownership in the property so sold become vested in him. A decision in such a proceeding, therefore, must

be said to be one determining the right of the auction-purchaser to have the sale confirmed and made absolute and of the judgment-debtor conferred by Rule 90 to have it set aside and a resale ordered. In our view an order in a proceeding under Order XXI, Rule 90, is a 'judgment' inasmuch as such a proceeding raises a controversy between the parties therein affecting their valuable rights and the order allowing the application certainly deprives the purchaser of rights accrued to him as a result of the auction-sale. We, therefore, agree with the High Court that a letters patent appeal lay against the order of the learned single Judge.

8. Rule 90 of Order XXI of the Code, as amended by the Allahabad High Court, inter alia provides that no sale shall be set aside on the ground of irregularity or even fraud unless upon the facts proved the Court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud. Mere proof of a material irregularity such as the one under Rule 69 and inadequacy of price realised in such a sale, in other words injury, is, therefore, not sufficient. What has to be established is that there was not only inadequacy of the price but that that inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity.

P.M. Abubakar vs. State of Karnataka and Ors.
MANU/SC/1494/2016 - AIR 2016 SC 5602The

debtor did not prefer application for setting aside the sale, inconformity with the remedy provided in that behalf in terms of Section 89A of the Karnataka Cooperative Societies Act, 1959 read with Rule 38 of the Karnataka Cooperative Societies Rules. That remedy could be availed by the debtor only after depositing the awarded amount together with interest thereon with the Recovery Officer, in terms of Rule 38(4)(a) of the Rules. The application as filed by the debtor was dismissed by the ARCS on 14.10.2008. Resultantly, the Competent Authority proceeded to confirm the auction sale on 02.03.2009, followed by grant of a certificate of sale and execution of a Sale Deed in the prescribed Form. The sale of the subject property thus, became final. The debtor, however, was ill advised to prefer an appeal before the Deputy Registrar (CS) of Cooperative Societies, against the decision of the Competent Authority confirming the auction sale. For, remedy of appeal before that Authority could be availed only in terms of Section 106 of the Act, against an order passed by the Authority (Registrar) in exercise of powers ascribable to the provisions referred to therein. The order of confirmation of sale is ascribable to Section 89A of the Act read with Rule 38 of the Rules. No remedy of appeal against that decision is provided. Section 106 of the Act does not provide for an appeal against the order confirming an auction sale, passed Under Section 89A read with Rule 38. Section 89A of the Act read with Rule 38 of the Rules provide for a special

dispensation. Thus understood, the order passed by the Deputy Registrar (CS) on the appeal preferred by the debtor being Appeal No. 7/2008-2009, is without jurisdiction. The learned Single Judge as well as the Division Bench has completely glossed over this crucial aspect. As aforesaid, the debtor unsuccessfully challenged the auction sale and prayed for setting aside the same by filing writ petitions. That relief has been rejected. In that, a formal application for setting aside the sale filed by the debtor was rejected by the ARCS on 14.10.2008. The appeal preferred by the debtor before the Deputy Registrar (CS) was against the decision of the Competent Authority confirming the auction sale on 02.03.2009. That it was not maintainable Under Section 106 of the Act. The Deputy Registrar (CS) had no jurisdiction. Further, once the auction sale is confirmed by the Competent Authority, it is not open to the Authority to exercise power under Rule 38(6), to set aside the sale. That would be against the spirit of legislative intent of giving finality to the auction sale process upon passing of an order of confirmation of sale. **Case analysis:** - The case of **Annapurna v. Mallikarjun and Anr. MANU/SC/0305/2014 : (2014) 6 SCC 397**. That decision is in respect of provisions of Order 21 Rule 89 of Code of Civil Procedure The question decided in this case is whether the time limit prescribed in Article 127 of the Limitation Act, 1963 would come into play even in respect of an application to set aside sale in terms of

Order 21 Rule 89 of the Code of Civil Procedure. **In the present case**, the debtor did not choose to file an application for setting aside the sale in terms of Rule 38(4) of the Rules at all. Instead, he preferred an appeal Under Section 106 of the Act before the Assistant Registrar after the order of confirmation of sale was passed by ARCS in favour of the auction purchaser. Such appeal Under Section 106 of the Act was not maintainable. The decision of confirmation of sale is not ascribable to any of the provisions expressly referred to in Section 106 of the Act, in respect of which remedy of appeal is provided. Further, the order passed by the Deputy Registrar dated 18th July 2009 in favour of the debtor to set aside the auction sale on conditions specified therein, in our view, is not ascribable even to an order passed under Rule 38(6). That discretion has to be exercised only by the Recovery Officer and more importantly before the order of confirmation of auction sale. **J. Rajiv Subramanayan and Anr. v. Pandiyas and Ors. MANU/SC/0207/2014 : (2014) 5 SCC 651 and Vasu P. Shetty v. Hotel Vandana Palace and Ors. MANU/SC/0341/2014 : (2014) 5 SCC 660.** Emphasis was placed on paragraphs 18 and 29 of the decision in Subramanayan's case (supra). Firstly, that decision is in respect of proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Further, the decision is on the facts of that case. **In this case**, the grievance regarding under valuation of

the property could have been raised by the debtor by way of a formal application to be filed for setting aside the sale, as per the statutory provisions (Rule 38). That contention is not relevant to answer the matters in issue, in the present case. Reliance was then placed on the dictum in paragraphs 23 and 25 in the case of Shetty (supra) to contend that inaction or intentional conduct of the debtor does not extricate the Bank from following mandatory conditions including proper valuation of the property. We fail to understand as to how this decision will come to the aid of the debtor who has failed to pursue statutory remedy for setting aside the sale as per Rule 38; and more so after the sale has already been confirmed in favour of the auction purchaser.

SETTING ASIDE AUCTION SALE - AFTER CONFIRMATION

**Ram Kishun and Ors. vs. State of U.P. and Ors.:
MANU/SC/0494/2012 - AIR 2012 SC 2288**

20. In Navalkha and Sons v. Sri Ramanya Das and Ors. MANU/SC/0614/1969 : AIR 1970 SC 2037, this Court while dealing with the confirmation of sale by Court, held that there must be a proper valuation report, which should be communicated to the judgment debtor and he should file his own valuation report and the sale should be conducted in accordance with law. After confirmation of sale, there

should be issuance of sale certificate. Court cannot interfere unless it is found that some material irregularity in the conduct of sale has been committed. The Court further held that it should not be a forced sale. A valuer's report should be as good as the actual offer and the variation should be within limit. Such estimate should be done carefully. The Court further held that unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. (See also: *M/s. Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd. and Ors.* MANU/SC/0012/1974 : AIR 1974 SC 1331; *Union Bank of India v. Official Liquidator High Court of Calcutta and Ors.* MANU/SC/0382/2000 : AIR 2000 SC 3642; *B. Arvind Kumar v. Govt. of India and Ors.* MANU/SC/2834/2007 : (2007) 5 SCC 745; and *M/s. Transcore v. Union of India and Anr.* MANU/SC/5319/2006 : AIR 2007 SC 712).

21. In *Divya Manufacturing Company (P) Ltd. and Anr. v. Union Bank of India and Ors.* MANU/SC/0427/2000 : AIR 2000 SC 2346, this Court held that a confirmed sale can be set aside on the ground of material irregularity or fraud. The court does not become functus officio after the sale is confirmed. In *Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. and Ors.* MANU/SC/3408/2008 : (2008) 9 SCC 299, the Court held that auction sale should be set aside only if there is a fundamental error in the procedure

of auction e.g. not giving wide publication or on evidence that property could have fetched more value or there is somebody to offer substantially increased amount and not only a little over the auction price. Involvement of any kind of fraud would vitiate the auction sale.

22. In FCS Software Solutions Ltd. v. La Medical Devices Ltd. and Ors. MANU/SC/7803/2008 : (2008) 10 SCC 440, this Court considered a case where after confirmation of auction sale it was found that valuation of movable and immovable properties, fixation of reserve price, inventory of Plant and Machineries had not been made in proclamation of sale, nor disclosed at time of sale notice. Therefore, in such a fact-situation, the sale was set aside after its confirmation.

23. In view of the above, the law can be summarised to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is co-extensive with that of principal debtor. In case there are more than one surety the liability is to be divided equally among the sureties for unpaid amount of loan. Once the sale has been confirmed it cannot be set aside unless a fundamental procedural error has occurred or sale certificate had been obtained by misrepresentation or fraud.

SUPREME COURT GUIDELINES TO SELL OR AUCTION PROPERTIES

In a Kerala Finance Corporation case, due to absence of rules and guidelines to sell confiscated properties, Supreme court framed following guidelines to be followed till such rules are framed, In **Kerala Finance Corporation Vs. Vincent Paul and Another reported in AIR 2011 SC 1388**

(i) The decision/intention to bring the property for sale shall be published by way of advertisement in two leading newspapers, one in vernacular language having sufficient circulation in that locality.

(ii) Before conducting sale of immovable property, the authority concerned shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:

- (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets; or
- (b) by inviting tenders from the public; or
- (c) by holding public auction; or
- (d) by private treaty.

Among the above modes, inviting tenders from the public or holding public auction is the best method for disposal of the properties belonging to the State.

(iii) The authority concerned shall serve to the borrower a notice of 30 days for sale of immovable secured assets.

(iv) A highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. It becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price.

(vi) The essential ingredients of sale are correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them.

(vii) Reserve price means the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price, i.e., the minimum bid at auction.

(viii) The debtor should be given a reasonable opportunity in regard to the valuation of the property

sought to be sold, in absence thereof the sale would suffer from material irregularity where the debtor suffer substantial injury by the sale.

In Navalkha and Sons v. Sri Ramanya Das and Ors.

MANU/SC/0614/1969 : AIR 1970 SC 2037, Court while dealing with the confirmation of sale by Court, held that there must be a proper valuation report, which should be communicated to the judgment debtor and he should file his own valuation report and the sale should be conducted in accordance with law. After confirmation of sale, there should be issuance of sale certificate. Court cannot interfere unless it is found that some material irregularity in the conduct of sale has been committed. The Court further held that it should not be a forced sale. A valuer's report should be as good as the actual offer and the variation should be within limit. Such estimate should be done carefully. The Court further held that unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. (See also: *M/s. Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd. and Ors.* MANU/SC/0012/1974 : AIR 1974 SC 1331; *Union Bank of India v. Official Liquidator High Court of Calcutta and Ors.* MANU/SC/0382/2000 : AIR 2000 SC 3642; *B. Arvind Kumar v. Govt. of India and Ors.* MANU/SC/2834/2007 : (2007) 5 SCC 745; and *M/s. Transcore v. Union of India and Anr.* MANU/SC/5319/2006 : AIR 2007 SC 712).

In Divya Manufacturing Company (P) Ltd. and Anr. v. Union Bank of India and Ors. MANU/SC/0427/2000 : AIR 2000 SC 2346, Court held that a confirmed sale can be set aside on the ground of material irregularity or fraud. The court does not become functus officio after the sale is confirmed.

In Valji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. and Ors. MANU/SC/3408/2008 : (2008) 9 SCC 299, the Court held that auction sale should be set aside only if there is a fundamental error in the procedure of auction e.g. not giving wide publication or on evidence that property could have fetched more value or there is somebody to offer substantially increased amount and not only a little over the auction price. Involvement of any kind of fraud would vitiate the auction sale.

COMPLIANCE OF STATUTORY PROVISIONS IN DISPOSING SECURED ASSETS

Ashok Kumar vs. Authorized Officer, Punjab National Bank and Ors. MANU/UP/0168/2017 - AIR 2017 All 178

In Lachhman Dass v. Jagat Ram and Ors. MANU/SC/7133/2007 : (2007) 10 SCC 448, the

Hon'ble Supreme Court held that a right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of statute. Similar view has been reiterated by the Apex Court in *Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. and Ors.* MANU/SC/7706/2007 : AIR 2007 SC 2458; and *Commissioner of Municipal Corporation, Shimla v. Prem Lata Sood and Ors.* MANU/SC/7717/2007 : (2007) 11 SCC 40. Thus the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance of the statutory provisions. In case the property is disposed of by private treaty without adopting any other mode provided under the aforesaid rules, there may be a possibility of collusion/fraud and even when public auction is held, the possibility of collusion among the bidders cannot be ruled out.

In State of Orissa and Ors. v. Harinarayan Jaiswal and Ors MANU/SC/0379/1972 : [1972] 3 SCR 784, the Apex Court held that a highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

In Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr. MANU/SC/0056/2002 : [2002] 1 SCR 621, the Hon'ble

Supreme Court consider this aspect and while placing reliance upon its earlier Judgment in *Chairman and Managing Director, SPICOT v. Contromix (P) Ltd.* MANU/SC/0313/1995 : AIR 1995 SC 1632 held as under:- "In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price. But many times it may not be possible to secure the best price by public auction when the bidders join together so as to depress the bid or the nature of the property to be sold is such that suitable bid may not be received at a public auction. In that event, any other suitable mode for selling of property can be by inviting tenders. In order to ensure that such sale by calling tenders does not escape attention of an intending participant, it is essential that every endeavour should be made to give wide publicity so as to get the maximum price."

Therefore, it becomes an legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price. Thus essential ingredients of such sale remain a correct valuation report and fixing the reserve price. In case proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate

valuation report the intending buyers may not come forward treating the property as not worth purchase by them. As a moneyed person or a big businessman may not like to involve himself in small sales/deals.

The word 'value' means intrinsic worth or cost or price for sale of a thing/property, (vide Union of India and Ors. v. Bombay Tyre International Ltd. and Ors. MANU/SC/0224/1983 : (1984) 1 SCC 467; and Gurbachan Singh and Anr. v. Shivalak Rubber Industries and Ors. MANU/SC/0800/1996 : [1996] 2 SCR 997. In State of U.P. v. Shiv Charan Sharma and Ors. MANU/SC/0396/1981 : AIR 1981 SC 1722, the Supreme Court explained the meaning of 'reserve price' explaining that the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price, i.e. the minimum bid at auction.

In Anil Kumar Srivastava v. State of U.P. and Anr. MANU/SC/0658/2004 : AIR 2004 SC 4299, the Hon'ble Apex Court considered the scope of fixing the reserve price and placing reliance on its earlier Judgment in Duncans Industries Ltd. v. State of U.P. and Ors. MANU/SC/0757/1999 : 2000 ECR 19 (SC), explained that reserve price limits the authority of the auctioneer. The concept of the reserve price is not synonymous with valuation of the property. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. The valuation is a question of fact, it should be fixed on

relevant material. The difference between the 'valuation' and 'reserve price' is that, fixation of an upset price may be an indication of the probable price which the property may fetch from the point of view of intending bidders. Fixation of the reserve price does not preclude the claimant from adducing proof that the land had been sold for a low price.

In view of the above, it is evident that there must be application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as the failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings.

In order to examine the correctness of the impugned orders, a serious look into Section 13 in particular Sub-section (8) of the SARFAESI Act along with Rules 8 and 9 of the Rules, 2002 is required. I, therefore, deem it appropriate to extract Sections 2(zc), 2(zf), 13(1) and (8) of the SARFAESI Act, as well as Rule 8 sub-rules (1), (3), (5) and (6) and also Rule 9(1) which are as under:-

"2 (zc) "secured asset" means the property on which security interest is created;

2(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;

13. Enforcement of security interest.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.....

(8). If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

Rule 8. Sale of immovable secured assets.-

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.....

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

- (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or
- (b) by inviting tenders from the public;
- (c) by holding public auction; or
- (d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include, -

- (a) The description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
- (b) the secured debt for recovery of which the property is to be sold;
- (c) reserve price, below which the property may not be sold;

- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- (e) depositing earnest money as may be stipulated by the secured creditor;
- (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

Rule 9. Time of sale, issue of sale certificate and delivery of possession, etc.-(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower."

GM, Sri Siddeshwara Co-operative Bank Ltd. and Ors. vs. Ikbal and Ors. (2013) 10 SCC 83: MANU/SC/0856/2013

Rule 9 provides for the detailed procedure with regard to sale of immovable property including issuance of sale certificate and delivery of possession. Sub-rule (1) of Rule 9 states that no sale of immovable property shall take place before the expiry of 30 days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to Sub-rule (6) or notice of sale has been served to the borrower. Sub-rule (2) provides that sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid. This is subject to confirmation by the secured creditor. There is a proviso appended to

Sub-rule (2) which provides that no sale under this rule shall be confirmed if the amount offered by sale price is less than the reserve price but this is relaxable in view of the second proviso appended to Sub-rule (2). Sub-rule (3) lays down that on every sale of immovable property, the purchaser shall immediately make the deposit of 25% of the amount of the sale price. In default of such deposit, the property shall forthwith be sold again. Sub-rule (4) provides that the balance amount of purchase price payable shall be paid by the purchaser on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties. Sub-rule (5) makes a provision that if the balance amount of purchase price is not paid as required under Sub-rule (4), then the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold. According to Sub-rule (6), on confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising power of sale shall issue a certificate of sale of the immoveable property in favour of the purchaser in the form given in Appendix V to the 2002 Rules.

Rule 9. Time of sale, Issue of sale certificate and delivery of possession, etc-

(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from

the date on which the public notice of sale is published in newspapers as referred to in the proviso to Sub-rule (6) or notice of sale has been served to the borrower.

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor: Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under Sub-rule (5) of Rule 9: Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty five per cent of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

(5) In default of payment within the period mentioned in Sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser

shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him: Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalisation of the sale.

(8) On such deposit of money for discharge of the encumbrances, the authorised officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in Sub-rule (7) above.

(10) The certificate of sale issued under Sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.

**Vasu P. Shetty vs. Hotel Vandana Palace and Ors.
AIR 2014 SC 1947: MANU/SC/0341/2014**

This Court, after interpreting the provisions of Rule 9, returned a categorical opinion that the said provision is mandatory in nature. It was further held that even though this Rule is mandatory, that provision is for the benefit of the borrower. The Court held that it is a settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their rights. These provisions neither expressly nor contextually indicate other wise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard and fast rule can be laid down in this regard.

**In Navalkha and Sons and ors v. Sri
Ramanya Das and ors MANU/SC/0614/1969 : AIR**

1970 SC 2037 the Apex Court while dealing with the confirmation of sale by Court held that there must be a proper valuation report, which should be communicated to the judgment debtor and he should file his own valuation report and the sale should be conducted in accordance with law and after confirmation of sale and issuance of sale certificate, Court cannot interfere unless it is found that some material irregularity in the conduct of sale has been committed. The Court further held that it should not be a forced sale. A valuer's report should be as good as the actual offer and the variation should be within limit. Such estimate should be done carefully and bids by the seasoned auctioneer. The Court further held as under:- "The condition of confirmation by the Court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the Court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion."

In M/s. Seth Kashi Ram Chemical (India) v. State of Haryana and Ors. MANU/SC/0126/1991 : AIR 1991 SC 478 the Apex Court held that highest bidder may be entitled for refund of the amount offered and deposited by him with interest by the Judgment debtor. He cannot claim the right to get the

property if there had been a compromise between the Judgment debtor and the secured creditor after the auction sale.

Non-compliance of statutory requirements of publication of possession notice and auction notice in vernacular language rendered the statutory requirement as farce. There should be purposeful compliance of the provisions of law and it cannot be reduced to an empty formality. The requirement to cause publication in 'vernacular language' in the newspaper is fundamental and the statutory requirement which cannot be compromised. It is not for the borrower or guarantor to establish that non-publication of the said notices in -'vernacular language' in the newspaper has caused any prejudice to its cause. It is for the Respondents to establish that non compliance of the statutory requirements has not caused any prejudice at all.

In view of the above, both the writ petitions succeed and are allowed. All proceedings subsequent to notice under Section 13(4) of the Act, 2002 being in flagrant violation of the statutory provisions are liable to be quashed. The case is squarely covered by the judgments of the Apex Court referred to above, wherein the Apex Court held that not following the statutory provisions itself is a good ground for quashing the confirmed sale.

NO RIGHT OF REDEMPTION AFTER SALE CERTIFICATE

Allokam Peddabbayya and Ors. vs. Allahabad Bank and Ors.: MANU/SC/0700/2017 - AIR 2017 SC 3069

Counsel appearing for the auction purchaser,, submitted that the sale in its favour stood concluded, sale certificate issued along with possession delivered, long before the Suit for redemption was filed. There existed no mortgage to be redeemed on the date of institution of the Suit. Referring to the proviso to Section 60, it was submitted that the right of redemption stood extinguished by reason of the Decree in and the consequent sale certificate. Despite being aware of the mortgage and auction sale, the Plaintiffs did not take steps for redemption of the mortgage and offer to deposit the mortgage money at the first instance. (O.S. case) was filed seeking permanent injunction only, without even impleading the Bank as Defendant or questioning the auction sale much less the sale certificate. The Suit was not filed bonafide. The sale deed of the Plaintiffs did not mention the existing mortgage, despite their being aware of the same. Under Order XXXIV Code of Civil Procedure, the mortgagor can offer to pay at any time but before confirmation of sale. The sale having been confirmed before institution of the Suit for redemption, no right of redemption of the mortgage survived. Sections 60 and 91 of the Act,

read as follows: 60. Right of mortgagor to redeem: At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished: PROVIDED that the right conferred by this Section has not been extinguished by the act of the parties or by decree of a court.

91. Persons who may sue for redemption - Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely,- (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same;

The right to enforce a claim for equity of redemption is a statutory right under the Act. It necessarily presupposes the existence of a mortgage. The right to redeem can stand extinguished either by

the act of the parties or by operation of the law in the form of a Decree of the Court under the proviso to Section 60 of the Act. The Appellants being purchasers of the equity of redemption can have or claim no better rights Under Section 91, than what their predecessor-in-interest had Under Section 60 of the Act.

The Decree for foreclosure in, and the subsequent auction sale followed by issuance of sale certificate, extinguished the right to redemption by reason of the proviso to Section 60. The Plaintiffs having interest in the mortgaged property through their predecessor-in-interest and in the right to redeem the same were competent to do so Under Section 91 of the Act, but subject to the limitation under the proviso to Section 60. Their rights could not be any superior or separate from that of their predecessor-in-interest. If the right to redeem stood extinguished by operation of the law under the proviso to Section 60 of the Act prior to the period of limitation, it cannot be contended that the right could nonetheless be enforced anytime before the expiry of limitation of 30 years. If there remained no subsisting mortgage, it is difficult to fathom what was to be redeemed.

The extinguishment of the right to redeem by virtue of the proviso to Section 60 of the Act fell for consideration in **L.K. Trust v. EDC Ltd.** **MANU/SC/0585/2011 : (2011) 6 SCC 780**, observing as follows: 55. Rejecting the appeal, this

Court in Narandas Karsondas case has held that the right of redemption which is embodied in Section 60 of the Transfer of Property Act is available to the mortgagor unless it has been extinguished by the act of the parties or by the decree of a court. What is held by this Court is that, in India it is only on execution of the conveyance and registration of transfer of the mortgagor's interest by registered instrument that the mortgagor's right of redemption will be extinguished but the conferment of power to sell the mortgaged property without intervention of the court, in a mortgage deed, in itself, will not deprive the mortgagor of his right of redemption.....

The effect of the proviso to Section 60 again fell for consideration in **Rukmini Amma and Ors. v. Rajeswary [dead] through L.Rs. MANU/SC/0299/2013 : (2013) 9 SCC 121**, wherein it was held: 29. In the above said background the factum of the filing of the suit nearly after 30 years of the mortgage was very relevant. If really the Respondents were serious about the consequences which flowed from the public auction-sale or were really aggrieved of the sale effected under Ext. B-5, the Respondents should have been prompt in taking any steps for redressal of their grievance in order to save the property mortgaged. Having failed to evince any such keen interest in protecting their property, it is too late in the day for the Respondents to have approached the Court at their own sweet will i.e. after nearly 30 long years of the mortgage and file a simple suit for redemption

without taking any steps to question a sale which was effected by way of public auction....

The extinguishment of the right to redeem under the proviso to Section 60 of the Act was again considered in **Embassy Hotels Pvt. Ltd. v. Gajaraj & Co. and Ors. MANU/SC/1040/2014 : (2015) 14 SCC 316** observing as follows: 15.... In such circumstances, in our considered view, the only option was to directly challenge the court auction of the suit property and the issuance of sale certificate. The learned Counsel for the Appellant has correctly submitted that as a result of judgment of this Court dated 20-2-1990 (P.K. Unni v. Nirmala Industries MANU/SC/0172/1990 : 1990 (2) SCC 378) the order of the executing court dated 7-5-1983 got confirmed and the sale certificate obtained finality. As a sequel, the ownership of the suit property or at least a major part of it got transferred from the first Defendant to the auction-purchaser the Appellant. In such a situation, it is not possible to accept the contention on behalf of the Plaintiff that the first Defendant being a mortgagor will continue to have a right of redemption although the sale of mortgaged property to a third party through a court auction became final.

In Mrutunjay Pani and Anr. v. Narmada Bala Sasmal and Anr. MANU/SC/0357/1961 : AIR 1961 SC 1353; it was observed as follows:

(1) The governing principle is "once a mortgage always a mortgage" till the mortgage is terminated by the act

of the parties themselves, by merger or by order of the court.

(2) Where a mortgagee purchases the equity of redemption in execution his mortgage decree with the leave of court or in execution of a mortgage or money decree contained by a third party, the equity of redemption may be extinguished; and, in that event, the mortgagor cannot sue for redemption without getting the sale set aside...

In B. Arvind Kumar v. Government of India and Ors. MANU/SC/2834/2007 : (2007) 5 SCC 745; the proviso to Section 60 of the Act fell for consideration and it was observed: ...The proviso specifically says that the right of redemption conferred on the mortgagor Under Section 60 could be extinguished by the act of parties or by decree of the court. The sale deed was executed in favour of the auction-purchaser on 10-11-1981 and the Appellants in their suit for redemption had not obtained any interim order staying the operation of the auction-sale or the execution of any sale deed and in the absence of (Sic thereof) such right of redemption would be extinguished.

In Mhadagonda Ramgonda Patil and Ors. v. Shripal Balwant Rainade and Ors. MANU/SC/0280/1988 : AIR 1988 SC 1200; it was observed that the mortgagor has a right of redemption even after sale has taken place pursuant to the final decree, but before the confirmation of sale.

The aforesaid discussion leads to the conclusion that the Plaintiffs lost the right to sue for redemption of the mortgaged property by virtue of the proviso to Section 60 of the Act, no sooner that the mortgaged property was put to auction sale in a suit for foreclosure and sale certificate was issued in favour of Defendant No. 2. There remained no property mortgaged to be redeemed. The right to redemption could not be claimed in the abstract.

HOW AUCTION SALE PRICE FETCHING IS LOOKED UPON IN LAND ACQUISITION CASES

Executive Engineer, Karnataka Housing Board vs. Land Acquisition Officer, Gadag and Ors: MANU/SC/0027/2011 - AIR 2011 SC 781 - But

auction sales stand on a different footing. When purchasers start bidding for a property in an auction, an element of competition enters into the auction. Human ego, and desire to do better and excel other competitors, leads to competitive bidding, each trying to outbid the others. Thus in a well advertised open auction sale, where a large number of bidders participate, there is always a tendency for the price of the auctioned property to go up considerably. On the other hand, where the auction sale is by banks or financial institutions, Courts, etc. to recover dues, there is an element of distress, a cloud regarding title, and a chance of litigation, which have the effect of

dampening the enthusiasm of bidders and making them cautious, thereby depressing the price. There is, therefore, every likelihood of auction price being either higher or lower than the real market price, depending upon the nature of sale. As a result, Courts are wary of relying upon auction sale transactions when other regular traditional sale transactions are available while determining the market value of the acquired land.

WHO IS TO CONFIRM AUCTION SALE

In Sikander Khan v. Radha Kishan : (2002) 9 SCC 405 , auction-sale of agricultural land was confirmed by the Collector. The judgment-debtor filed an application under Order 21, Rule 90 of the Code of Civil Procedure, 1908 contending that the Collector had no jurisdiction to confirm the sale and his action, therefore, was null and void. Upholding the contention and setting aside the sale, this Court said; "Learned Counsel appearing for the appellants urged that the view taken by the High Court that the Collector had jurisdiction to confirm the auction-sale was patently erroneous. In other words, what the learned Counsel contends is that under Section 71 of the Code read with Order 21 Rule 92 CPC, the Collector is only authorised to hold and conduct the auction-sale but he has no power to confirm the sale. According to him, the confirmation of auction-sale can only be done by the civil court after deciding the objections, if filed. We

find substance in the argument. Order 21 Rule 92 of the Code of Civil Procedure provides that the civil court shall have power to make an order confirming the sale and thereupon the sale shall become absolute. What Section 71 of the Code provides is that where the execution of the decree is passed by the competent civil court, which cannot be satisfied and requires sale of the agricultural holding of a pakka tenant, the auction-sale of such land shall be conducted by the Collector on fulfilment of certain conditions. It is, therefore, crystal clear that only the auction-sale of an agricultural land is to be held and conducted by the orders of the Collector and not the confirmation of such sale. In view of the fact that in the present case the auction-sale of the appellants' land was not confirmed by the civil court, the auction-sale was a nullity and the executing court was right when it set aside the impugned auction-sale."

BANK CAN BID AND PURCHASE IN AUCTION SALE

ICICI Bank Ltd. vs. Aburubam and Company and Ors.: MANU/SC/1441/2016 - (2018) 15 SCC 267

Applications were instituted by the Appellant-Bank before the Debts Recovery Tribunal (DRT) claiming a sum of Rs. 57,22,710/- and Rs. 29,31,235.77/- respectively with interest against two separate financial accommodation provided to the Respondents-borrowers. The Respondents-borrowers came up with a proposal for private sale of the

mortgaged properties and accordingly sought and obtained permission of the Tribunal. Tenders were invited. However, the aforesaid proposal did not materialize. Hence the DRT directed the Recovery Officer to conduct a public auction after fixing the offset price in both the cases. Thereafter, public notice was issued with regard to the sale of two properties intimating the offset price which was fixed at Rs. 43,00,000/- and 33,00,000/- respectively. However, no bidder came forward to purchase the properties. In such circumstances, the Bank itself had offered to purchase the properties at Rs. 43,10,000/- and 33,10,000/- respectively. The Bank's offer was accepted and a total amount of Rs. 76,20,000/- was deposited with the Recovery Officer by the Bank. Even at this stage the Bank gave an option to the Respondents-borrowers to deposit the amount of Rs. 76,20,000/- with interest. The said offer was not acted upon by the Respondents-borrowers.

Against the sale of the two mortgaged properties, the Respondents-borrowers moved the DRT. By order the DRT dismissed the application. The said order of the DRT was also upheld by the Debts Recovery Appellate Tribunal (DRAT).

The Respondents-borrowers filed petitions before the High Court challenging the orders passed by the DRT and DRAT respectively. The impugned orders set aside the orders of the DRT and DRAT and remanded the matter to the DRT with the direction to re-decide the matter after giving full opportunity to the

Respondents-borrowers in the matter of fixation of the offset price and also after complying with the provisions of the Rule 17 of the Second Schedule of Income Tax Rules, 1961. Hence, the Bank filed the present appeals.

Supreme Court by allowing appeals held that, The offset price was fixed on the basis of a report of the Valuation Officer and in the fixation of the said price the Respondents were associated being party to the proceedings before the DRT. That apart the said grievance of the Respondents-borrowers must be considered in the light of the fact that the Respondents-borrowers had persistently failed either to liquidate the dues or to bring a willing purchaser who could offer a reasonable price for the mortgaged properties. Regarding the Second Schedule of Income Tax Rules, 1961, nothing was brought to notice which can be construed as imposing a restriction on the Bank from participating in the bid/auction once the invitation to bid did not result in any response from any interested bidder. Rule 17 does not impose such a restriction inasmuch as it is the Recovery Officer on whom such an embargo has been placed. In this regard the provisions of Rule 59, which permit the Assessing Officer to take part in the auction would be of a particular significance. The conclusion of the High Court that the auction sale in favour of the Bank was vitiated on account of violation of the Rule 17 of the Second Schedule of Income Tax Rules, 1961, could

not be accepted. The order of the High Court was set aside.

VALUATION REPORT OF EXPERT ESSENTIAL - TO DECIDE REASONABLE PRICE

In the case of Union Bank of India v. Official Liquidator, MANU/SC/0382/2000 : 2000 (5) SCC 274, the Apex Court has observed as under:

In auction-sale of the property of the company which is ordered to be wound up, the Company Court acts as a custodian for the interest of the Company and its creditors. It is the duty of the Company Court to satisfy itself as to reasonableness of price by disclosing valuation report to secured creditors of the company and other interested persons. It was further held that the Court should exercise judicial discretion to ensure that sale of property should fetch adequate price. For deciding what would be reasonable price, valuation report of an expert is essential. The Company Judge himself must apply his mind to the valuation report. The Court observed that the High Court did not interfere with the auction-sale on the ground of sympathy for the workers which was not proper. The auction-sale was, therefore, set aside by this Court and the Official Liquidator was directed to resell the property after obtaining fresh valuation report and after furnishing copy of such report to secured creditors.

In Gajraj Jain v. State of Bihar and others, MANU/SC/0476/2004 : (2004) 7 SCC 151, the Apex Court held that in absence of valuation report and reserve price, the auction sale becomes only a pretence and if there is no proper mechanism and if the intending purchasers are not able to know the details of the assets or itemised valuation, the auction-sale cannot be said to be in accordance with law. If publicity and maximum participation is to be attained, all bidders must know the details of the assets and the valuation thereof.

In State of Uttar Pradesh and others v. Swadeshi Polytex Limited and others, MANU/SC/7753/2008 : (2008) 12 SCC 596, the sale proclamation had been issued on 1.4.2005 without any valuation of properties and only the area of vacant land had been specified therein and it was this notice that had been served on the chowkidar on 21.4.2005 and publication had been made in newspaper on 22.4.2005. The auction was held on 2.5.2005. In backdrop of this case, it was found that there was clear violation of Rules 282 and 283 of U.P.Z.A. & L.R. Rules. The Apex Court further held that the question of valuation is of the utmost importance as it is designed to ensure the best price for the property and it is essential in this circumstance that wide publication and notice of the proposed sale should be given as per Rule 285-A of the Rules. The pertinent

observations made by Apex Court in paras 31 and 37 of the aforesaid decision are quoted as under: 31. Rule 283 provides for the estimated value of the property to be determined under the provisions contained in Chapter XV of the Revenue Manual. The said Chapter specifies the procedure for valuation of the property in terms of other similar properties. It is, however, clear from the record that the figure Rs. 27 crores, the value of the property which is mentioned in the advertisement in Amar Ujala, appears to have picked up without any basis as it is not the case of UPSIDC that the property had been valued in accordance with the provisions of the Revenue Manual or by a valuer or expert in the field. 37. The question of valuation is to our mind of the utmost importance as it is designed to ensure the best price for the property and it is essential in this circumstance that wide publication and notice of the proposed sale should be given as per Rule 285-A which postulates a notice of 30 days between the date of issuance of the sale proclamation and the date of auction. It can hardly be over emphasised that the proper valuation of the property and wide publicity of the proposed auction is intimately linked with the price that the auction fetches. As already mentioned above, the auction had been held on 2.5.2005. The sale proclamation had been issued on 1.4.2005, and served on the chowkidar on 21.4.2005, the publication made in Amar Ujala on 22.4.2005 whereas Rule 285-A itself postulates a

notice period of 30 days to be counted from the date of issuance of the sale proclamation.

S.J.S. Business Enterprises (P) Ltd. v. State of Bihar, MANU/SC/0236/2004 : 2004 (7) SCC 166 -

We are of the view that the sale effected in favour of Respondent 6 cannot be sustained. It is axiomatic that the statutory powers vested in State financial corporation under the State Financial Corporations Act, must be exercised bona fide. The presumption that public officials will discharge their duties honestly and in accordance with the law may be rebutted by establishing circumstances which reasonably probabalise the abuse of that power. In such event it is for the officer concerned to explain the circumstances which are set up against him. If there is no credible explanation forthcoming the Court can assume that the impugned action was improper.

In SIPCOT v. Contromix(P) Ltd., MANU/SC/ 0313/ 1995 : 1995 (4) SCC 595, it was held by the Apex Court that reasonableness is to be tested against dominant consideration to secure best price for the property to be sold. The Apex Court further held that this can be achieved only when there is maximum public participation in the process of sale and everybody has opportunity of making offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price. It was

further observed that adequate publicity to ensure maximum participation of bidders in turn requires that fair and practical period of the time must be given to purchasers to effectively participate in the sale. Unless the subject-matter of sale is of such a nature which requires immediate disposal, an opportunity must be given to the possible purchaser who is required to purchase the property on 'as-is-where-is basis' to inspect it and to give a considered offer with the necessary financial support to deposit the earnest money and pay the offered amount, if required.

VALUATION & RESERVE PRICE

**Ram Kishun and Ors. vs. State of U.P. and Ors.:
MANU/SC/0494/2012 - AIR 2012 SC 2288**

13. The word 'value' means intrinsic worth or cost or price for sale of a thing/property. (Vide: Union of India and Ors., v. Bombay Tyre International Ltd. and Ors. MANU/SC/0224/1983 : (1984) 1 SCC 467; and Gurbachan Singh and Anr. v. Shivalak Rubber Industries and Ors. MANU/SC/0800/1996 : AIR 1996 SC 3057).

14. In State of U.P. v. Shiv Charan Sharma and Ors. MANU/SC/0396/1981 : AIR 1981 SC 1722, this Court explained the meaning of "reserve price" explaining that the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price, i.e. the minimum bid at auction.

15. In *Anil Kumar Srivastava v. State of U.P. and Anr.* MANU/SC/0658/2004 : AIR 2004 SC 4299, this Court considered the scope of fixing the reserve price and placing reliance on its earlier judgment in *Duncans Industries Ltd. v. State of U.P. and Ors.* MANU/SC/0757/1999 : AIR 2000 SC 355, explained that reserve price limits the authority of the auctioneer. The concept of the reserve price is not synonymous with valuation of the property. These two terms operate in different spheres. An invitation to tender is not an offer. It is an attempt to ascertain whether an offer can be obtained with a margin. The valuation is a question of fact, it should be fixed on relevant material. The difference between the 'valuation' and 'reserve price' is that, fixation of an upset price may be an indication of the probable price which the property may fetch from the point of view of intending bidders. Fixation of the reserve price does not preclude the claimant from adducing proof that the land had been sold for a low price.

16. In *Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh* MANU/SC/0562/1994 : (1994) 1 SCC 131, this Court held that in an auction sale and in execution of the Civil Court's decree, the Court has to apply its mind to the need for furnishing the relevant material particulars in the sale proclamation and the records must indicate that there has been application of mind and principle of natural justice had been complied with. (See also: *Gajadhar Prasad and Ors. v. Babu Bhakta Ratan and Ors.* MANU/SC/0013/1973 : AIR

1973 SC 2593; S.S. Dayananda v. K.S. Nagesh Rao and Ors. MANU/SC/1150/1997 : (1997) 4 SCC 451; D.S. Chohan and Anr. v. State Bank of Patiala : (1997) 10 SCC 65; and Gajraj Jain v. State of Bihar and Ors. MANU/SC/0476/2004 : (2004) 7 SCC 151).

17. In view of the above, it is evident that there must be an application of mind by the authority concerned while approving/accepting the report of the approved valuer and fixing the reserve price, as the failure to do so may cause substantial injury to the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings.

SECOND APPLICATION TO SET ASIDE AUCTION UNDER SECTION 17(1) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

Oasis Dealcom Pvt. Ltd. vs. Khazana Dealcomm Pvt. Ltd. and Ors.: AIR 2016 SC 5405 MANU/ SC/ 1438/ 2016 - A submission had been made on behalf of the Appellant that the second application filed Under Section 17 of the Act was not maintainable and therefore, it ought not to have been entertained by the Tribunal. We are not in agreement with the said submission for the reason that when another application was filed Under Section 17(1) of the Act, the cause of action was different. At an earlier point of

time, the issuance of notice as well as notice for sale of the flat had been challenged, whereas the subsequent application had been filed after the auction had been held. The cause of action in respect of both the applications was not same and therefore, in our opinion, the second application for a different cause of action was maintainable.

DECISION TO SELL WHOLE OR PART of THE SECURED ASSETS

Ram Kishun and Ors. vs. State of U.P. and Ors.: MANU/SC/0494/2012 - AIR 2012 SC 2288

18. In *Ambati Narasayya v. M. Subba Rao and Anr.* MANU/SC/0025/1990 : AIR 1990 SC 119, this Court dealt with a case where in execution of a money decree for Rs. 2,400/- the land was sold for Rs. 17,000/-. The Court set aside the sale observing that there is a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. (See also: *Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma and Ors.* MANU/SC/0035/1977 : AIR 1977 SC 1789; and *S. Mariyappa (Dead) By L.Rs. and Ors. v. Siddappa and Anr.* MANU/SC/0572/2004 : (2005) 10 SCC 235).

19. Thus, in view of the above, it is evident that law requires a proper valuation report, its acceptance by the authority concerned by application of mind and then fixing the reserve price accordingly and acceptance of the auction bid taking into

consideration that there was no possibility of collusion of the bidders. The authority is duty bound to decide as to whether sale of part of the property would meet the outstanding demand. Valuation is a question of fact and valuation of the property is required to be determined fairly and reasonably.

WHEN RULES ARE NOT FRAMED IN KERALA - SUPREME COURT FRAMED GUIDELINES

Kerala Financial Corporation vs. Vincent Paul and Ors. AIR 2011 SC 1388 ; MANU/SC/0232/2011 -

Though the KFC has initiated proceedings under Section 29 of the Act, (State Financial Corporations Act, 1951) admittedly, the State has not framed Rules or guidelines in the form of executive instructions for sale of properties owned by them. Till such formation of Rules or guidelines or orders as mentioned above, we direct the KFC to adhere the following directions for sale of properties owned by it:

- (i) The decision/intention to bring the property for sale shall be published by way of advertisement in two leading newspapers, one in vernacular language having sufficient circulation in that locality.
- (ii) Before conducting sale of immovable property, the authority concerned shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such

immovable secured asset by any of the following methods:

- (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets; or
- (b) by inviting tenders from the public; or
- (c) by holding public auction; or
- (d) by private treaty.

Among the above modes, inviting tenders from the public or holding public auction is the best method for disposal of the properties belonging to the State.

(iii) The authority concerned shall serve to the borrower a notice of 30 days for sale of immovable secured assets.

(iv) A highest bidder in public auction cannot have a right to get the property or any privilege, unless the authority confirms the auction sale, being fully satisfied that the property has fetched the appropriate price and there has been no collusion between the bidders.

(v) In the matter of sale of public property, the dominant consideration is to secure the best price for the property to be sold. This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. It becomes a legal obligation on the part of the authority that property be sold in such a manner that it may fetch the best price.

(vi) The essential ingredients of sale are correct valuation report and fixing the reserve price. In case

proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report, the intending buyers may not come forward treating the property as not worth purchase by them.

(vii) Reserve price means the price with which the public auction starts and the auction bidders are not permitted to give bids below the said price, i.e., the minimum bid at auction.

(viii) The debtor should be given a reasonable opportunity in regard to the valuation of the property sought to be sold, in absence thereof the sale would suffer from material irregularity where the debtor suffer substantial injury by the sale.

RECOVERY PROCEDURE AND AUCTION VALIDITY

Division Bench of Orissa High Court presided over by the Hon'ble Chief Justice Dr. B.S. Chauhan, in the case of Swastik Agency & others v. State Bank of India, reported in MANU/OR/0010/2009 : 2009

(I) CLR 629 : 2009 (ii) OLR 201 and in terms of the aforesaid judgment, the Court has come to conclude as follows:

(a) "Possession notice" is mandatorily required to be published in two leading newspapers having wide circulation in the concerned area and one of them must be in vernacular language. After having the valuation report, the authority has to then take a decision as to whether the property is to be sold as a

whole or in part and accordingly reserve price is to be fixed. It further provides the various modes of alienation of the property including through tenders, holding public auction and even by private negotiation. Notice of sale is to be served upon the borrower. In case property is to be disposed of by auction, 'notice of auction sale' is also to be published in two leading newspapers having wide circulation in the said locality and one of them is to be in vernacular language.

(b) Public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of statutory provisions.

(c) The essential ingredients of sale remain a correct valuation report and fixing the reserve price. In the event proper valuation has not been made and the reserve price is fixed taking into consideration the inaccurate valuation report the intending buyers may not come forward treating the property as not worth purchase by them since a moneyed person or a big businessman may not like to involve himself in small sales/transactions.

(d) There must be application of mind by the authority concerned by accepting and fixing of reserve price as the failure to do so may cause substantial injury to

the borrower/guarantor and that would amount to material irregularity and ultimately vitiate the subsequent proceedings.

(e) The law mandates a proper valuation report and its acceptance by the authority concerned must be after due application of mind and then fixing the reserve price accordingly. An auction should be conducted in a manner where there is no possibility of collusion amongst the bidders apart from the authority being duty bound to decide as to whether sale of part of the property would meet the outstanding demand or not.

(f) The authority is under a legal obligation to be satisfied itself that price fetched is reasonable and sale has been conducted giving strict adherence to the procedure prescribed by the statute and if the sale is confirmed without considering the issue the confirmation stands vitiated and/or material irregularity in conduct of the sale would vitiate the proceedings. Therefore, auction sale can be set aside even after confirmation.

(g) When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has a legal position that, where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. The other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusio alterius" which means if a statute

provides for a thing to be done in a particular, then it has to be done in that manner and in no other manner.

(h) It is the settled legal proposition that if initial action is not in consonance with law, the subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim 'sublato fundamental credit opus' is applicable which means thereby in a case where foundation is removed, the superstructure has to fall.

(i) The writ jurisdiction is discretionary in nature and must be exercised in furtherance of justice. The Court has to keep in mind that its order should not defeat the interest of justice nor it should permit an order to secure dishonest advantage or perpetuate an unjust gain or approve an order which has been passed in contravention of the statutory provisions. When the action of the State or its instrumentalities is not as per the rules or regulations and supported by the statute, the Court must exercise its jurisdiction to declare such an act to be illegal and invalid.

(j) The legal position remains that every statutory provision requires strict adherence, for the reason that the statute creates rights in favour of the citizens, and if any order is passed de hors the same, it cannot be held to be a valid order and cannot be enforced. As the statutory provision creates legal rights and obligations for individuals, the statutory authorities are under a legal obligation to give strict adherence to the same and cannot pass an order in contravention

thereof, treating the same to be merely decoration pieces.

(k) Rules of interpretation requires that construction, which carries on objectives of the statute, protects interest of the party and keeps the remedy alive, should be preferred looking into the text and context of the statute. It must be so as to further the ends of justice and not to frustrate the same. Construction given by the Court must promote the object of the statute and serve the purpose, for which it had been enacted and should not efface its very purpose.

(l) The highest bidder at the auction may be entitled for refund of the amount already deposited by him with interest.

In M/s. Seth Kashi Ram Chemical (India) v. State of Haryana and Ors. MANU/SC/0126/1991 : AIR1991SC478 , the Apex Court held that highest bidder may be entitled for refund of the amount offered and deposited by him with interest by the Judgment debtor. He cannot claim the right to get the property if there had been a compromise between the Judgment debtor and the secured creditor after the auction sale.

Apex Court in Mangal Prasad (dead) by LRs and Anr. v. Krishna Kumar Maheshwari and Ors. MANU/SC/0356/1992 : AIR1992SC1857 , observing that an equitable relief should be granted to

the auction purchaser to refund the amount with interest.

In Authorised Officer, Indian Overseas Bank and Anr. v. Ashok Saw Mill MANU/SC/1219/2009 :

(2009) 8 SCC 366 though in a different context, the Court has expressed thus: 30. The scheme of the SARFAESI Act as it now stands after the 2004 Amendment for enforcement of security interest is that notwithstanding the provisions of Section 69 or Section 69-A of the Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, in accordance with the provisions of the Act. ...

33. It is clear that while enacting the SARFAESI Act the Legislature was concerned with measures to regulate securitisation and reconstruction of financial assets and enforcement of security interest. The Act enables the Banks and Financial Institutions to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

34. The provisions of Section 13 enable the secured creditors, such as Banks and Financial Institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of

the business of the borrower, including the right to transfer by way of lease, assignment or sale for realizing secured assets, subject to the conditions indicated in the two provisos to Clause (b) of Sub-Section (4) of Section 13.

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the Banks or Financial Institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in Sub-Section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the Banks and Financial Institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

37. The consequences of the authority vested in DRT under Sub-Section (3) of Section 17 necessarily implies that the DRT is entitled to question the action

taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The Legislature by including Sub-Section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr. Gopalan and Mr. Altaf Ahmed that the DRT has no jurisdiction to deal with a post 13(4) situation, cannot be accepted.

38. The dichotomy in the views expressed by the Bombay High Court and the Madras high Court has, in fact, been resolved to some extent in the Mardia Chemicals Ltd.'s case (supra) itself and also by virtue of the amendments effected to Sections 13 and 17 of the principal Act. The liberty given by the learned Single Judge to the appellants to resist S.A. No. 104 of 2007 preferred by the respondents before the DRT on all aspects was duly upheld by the Division Bench of the High Court and there is no reason for this Court to interfere with the same.

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be

set aside but even the status quo ante can be restored by the DRT."

In United Bank of India v. Satyawati Tondon and Ors. MANU/SC/0541/2010 : (2010) 8 SCC 110

Court restated the purpose of bringing the SARFAESI Act and in that context observed the role of the tribunal as under: 23. Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with Sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under Sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt. 24. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made Under Section 17 is required to be

disposed of. The proviso to this Sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously.

POWERS OF RECOVERY OFFICER

Gobinda Chandra Pattnaik vs. Presiding Officer, Debt Recovery Tribunal and Ors. 2009 (II) OLR 374: MANU/OR/0259/2009 The Recovery Officer is a statutory authority and is vested with powers under Sections 25 and 28 of the RDDDFBI Act, 1993. In the exercise of such statutory authority, the Recovery Officer is vested with authority to effect auction sale of mortgaged property and confirm such sale and to execute the sale certificate in favour of the successful bidder. We also take note of the fact that if any person is aggrieved of any such order passed by the Recovery Officer, remedy is available under Section 30 of the RDDDBFI Act, 1993 to file an appeal before the D.R.T.. It is important here to note that, when a Recovery Officer effects direct auction/sale of mortgage property, he in fact, acts as an Executing Court for executing a decree that has been passed in an original application, by the Debt Recovery Tribunal. Therefore,

the essential rule of Recovery Officer in such circumstances is one of execution of a decree passed by the Tribunal. Therefore, the Recovery Officer exercises his authority to execute the decree of the Tribunal and also has a authority to put the mortgage assets to be auctioned and upon deposit of the sale consideration by the successful bidder is also further empowered to issue orders of confirmation of sale, as well as to issue sale certificate. This is very well settled in law that this act by Recovery Officer of putting mortgage property to sale, confirming such sale and issuing sale certificate having the legal effect of extinguish the title of the mortgagor and creating fresh title in favour of the successful auction purchaser. Therefore, in the exercise of such authority by a Recovery Officer is clearly quasi judicial in nature. We are of the considered view that while the Recovery Officer may be vested with other administrative duties under the Act, yet, the actions of the Recovery Officer while putting mortgaged property to sale, confirming such sale and issuing certificate of sale, is clearly "quasi judicial in nature". Therefore, the preliminary contention of the opposite party No. 4 that the impugned action of the Recovery Officer is not susceptible a writ of certiorari since such auction is purely administrative in nature is noted, only to be rejected. We reiterate that all such actions of the Recovery Officer as impugned before us, is clearly "quasi judicial" in nature and not "administrative" and, therefore, clearly amenable to a writ of certiorari.

**ONCE NOTIFIED SALE DOES NOT TAKES PLACE -
FRESH NOTICE OF 30 DAYS REQUIRED**

**In Mathew Varghese v. M. Amritha Kumar
[MANU/SC/0114/2014 : (2014) 5 SCC 610],**

48. Keeping the said basic principle in applying the above provisions in mind, when we refer to Rule 15 of the Income Tax Rules, 1962, in the first place it will have to be stated that a reading of the said rule does not in any way conflict with either Section 13(8) of the SARFAESI Act or Rules 8 and 9 of the Rules, 2002. As far as Sub-rule (1) of Rule 15 is concerned, it only deals with the discretion of the Tax Recovery Officer to adjourn the sale by recording his reasons for such adjournment. The said Rule does not in any way conflict with either Rules 8 or 9 or Section 13, in particular Sub-section (1) or Sub-section (8) of the SARFAESI Act. Therefore, to that extent there is no difficulty in applying Rule 15. As far as Sub-rule (2) is concerned, the same is clear to the effect that a sale of immovable property once adjourned under Sub-rule (1) for a longer period than one calendar month, a fresh proclamation of sale should be made unless the defaulter consents to waive it. The said sub-rule also does not conflict with any of the provisions of the SARFAESI Act, in particular Section 13 or Rules 8 and 9. In fact there is no provision relating to grant of adjournment or issuance of a fresh proclamation for effecting the sale after the earlier date of sale was not

adhered to in the SARFAESI Act. In such circumstances going by the prescription contained in Section 37 of the SARFAESI Act, as we have reached a conclusion that the provision contained in Section 29 of the RDDB Act will be in addition to and not in derogation of the provisions of the SARFAESI Act, the provisions contained in Rule 15, which is applicable by virtue of the stipulation contained in Section 29 of the RDDB Act, whatever stated in Sub-rule (2) of Rule 15 should be followed in a situation where a notice of sale notified as per Rules 8 and 9(1) of the Securitisation Trust Rules, read along with Section 13(8) gets postponed. In our considered view such a construction of the provisions, namely, Sections 37, 13(8) and 37 of the SARFAESI Act, read along with Section 29 with the aid of Rule 15 could alone be made and in no other manner.

49. We, therefore, hold that unless and until a clear 30 days notice is given to the borrower, no sale or transfer can be resorted to by a SECURED CREDITOR. In the event of any such sale properly notified after giving 30 days clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the SECURED CREDITOR cannot effect the sale or transfer of the SECURED ASSET on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame

cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is Sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as Sub-rule (8) is concerned, the parties referred to can only relate to the SECURED CREDITOR and the borrower. It is, therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Section 13(1) and (8) of the said Act.

WAIVER OF RIGHTS BY BORROWER

Court in General Manager, Sri Siddeshwara Cooperative bank Limited and Anr. v. Ikbali and Ors. MANU/SC/0856/2013 : (2013) 10 SCC 83 wherein it is held that the mandatory provision of 30 days notice can be waived by the borrower and in such an eventuality, the sale cannot be voided.

**Vasu P. Shetty vs. Hotel Vandana Palace and Ors.
AIR 2014 SC 1947: MANU/SC/0341/2014**

This Court, after interpreting the provisions of Rule 9, returned a categorical opinion that the said provision is mandatory in nature. It was further held that even though this Rule is mandatory, that provision is for the benefit of the borrower. The Court held that it is a settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their rights. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on the facts of each case and no hard and fast rule can be laid down in this regard.

In State of Punjab v. Davinder Pal Singh Bhullar and Ors. MANU/SC/1476/2011 : 2011 (14) SCC 770; the Court explained the doctrine of waiver on the basis of earlier pronouncements which are taken note of discussed in the following manner:

37. In *Manak Lal* this Court held that alleged bias of a Judge/official/Tribunal does not render the proceedings invalid if it is shown that the objection in

that regard and particularly against the presence of the said official in question, had not been taken by the party even though the party knew about the circumstances giving rise to the allegations about the alleged bias and was aware of its right to challenge the presence of such official. The Court further observed that: (SCC p. 431, para 8) 8...waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question.

38. Thus, in a given case if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an unfavourable order, he adopted the device of raising the issue of bias. The issue of bias must be raised by the party at the earliest. (See *Pannalal Binjraj v. Union of India and P.D. Dinakaran* (1) v. Judges Enquiry Committee)

39. In *Power Control Appliances v. Sumeet Machines* (P) Ltd. this Court held as under: (SCC p. 457, para 26) 26. Acquiescence is sitting by, when another is invading the rights.... It is a course of conduct

inconsistent with the claim...It implies positive acts; not merely silence or inaction such as involved in laches....The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the Defendant....

40. Inaction in every case does not lead to an inference of implied consent or acquiescence as has been held by this Court in *P. John Chandy and Co. (P) Ltd. v. John P. Thomas*. Thus, the Court has to examine the facts and circumstances in an individual case.

41. Waiver is an intentional relinquishment of a right. It involves conscious abandonment of an existing legal right, advantage, benefit, claim (sic) or privilege, which except for such a waiver, a party could have enjoyed. In fact, it is an agreement not to assert a right. There can be no waiver unless the person who is said to have waived, is fully informed as to his rights and with full knowledge about the same, he intentionally abandons them. (*Vide Dawsons Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha, Basheshar Nath v. CIT, Mademsetty Satyanarayana v. G. Yelloji Rao, Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh, Jaswantsingh Mathurasingh v. Ahmedabad Municipal Corporation, Sikkim Subba Associates v. State of Sikkim and Krishna Bahadur v. Purna Theatre.*)

42. This Court in *Municipal Corporation of Greater Bombay v. Dr Hakimwadi Tenants' Assn.* considered the issue of waiver/acquiescence by the non-parties to the proceedings and held: (SCC p. 65, paras 14-15)

14. In order to constitute waiver, there must be voluntary and intentional relinquishment of a right. The essence of a waiver is an estoppel and where there is no estoppel, there is no waiver. Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case. ... 15. There is no question of estoppel, waiver or abandonment. There is no specific plea of waiver, acquiescence or estoppel, much less a plea of abandonment of right. That apart, the question of waiver really does not arise in the case. Admittedly, the tenants were not parties to the earlier proceedings. There is, therefore, no question of waiver of rights by Respondents 4-7 nor would this disentitle the tenants from maintaining the writ petition.

SALE THROUGH PRIVATE TREATY SET ASIDE IN A CASE

J. Rajiv Subramaniam and Ors. vs. Pandiyas and Ors. (2014) 5 SCC 651: MANU/SC/ 0207/ 2014

Provision contained in Section 13(8) of the SARFAESI Act, 2002 is specifically for the protection of the borrowers in as much as, ownership of the secured assets is a constitutional right vested in the borrowers and protected under Article 300A of the Constitution of India - Therefore, the secured creditor as a trustee of the secured asset cannot deal with the same in any manner it likes and such an asset can be disposed of only in the manner prescribed in the SARFAESI Act, 2002 - Creditor should ensure that the borrower was

clearly put on notice of the date and time by which either the sale or transfer will be effected in order to provide the required opportunity to the borrower to take all possible steps for retrieving his property - Such a notice is also necessary to ensure that the process of sale will ensure that the secured assets will be sold to provide maximum benefit to the borrowers - Notice is also necessary to ensure that the secured creditor or any one on its behalf is not allowed to exploit the situation by virtue of proceedings initiated under the SARFAESI Act, 2002 - Accordingly the sale in favour of the Appellants and the subsequent delivery of possession to the Appellants was null and void and the sale was accordingly set aside - Appellants were directed to deliver the possession of the property purchased by them under the Sale Deed to Respondent Nos. 1 and 2 immediately upon receiving the entire amount as directed

CHAPTER - 8

INTEREST

OBSERVATIONS OF CONSTITUTION BENCH OF SUPREME COURT

**Central Bank Of India vs Ravindra And Ors (2002)
1 SCC 367**

**"the principal sum adjudged" and "such principal
sum" as occurring in Section 34 of the Code of
Civil Procedure, 1908**

However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under;

(1) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest, i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy.

(2) Novation, that is, debtor entering into a fresh agreement with creditor undertaking payment of previously borrowed principal amount coupled with interest by treating the sum total as principal, any

contract express or implied and an express acknowledgement of accounts, are best evidence of capitalisation. Acquiescence in the method of accounting adopted by the creditor and brought to the knowledge of the debtor may also enable interest being converted into principal. A mere failure to protest is not acquiescence.

(3) The prevalence of banking practice legitimatises stipulations as to interest on periodical rests and their capitalisation being incorporated in contracts. Such stipulations incorporated in contracts voluntarily entered into and binding on the parties shall govern the substantive rights and obligations of the parties as to recovery and payment of interest.

(4) Capitalisation method is founded on the principle that the borrower failed to make payment though he could have made and thereby rendered himself a defaulter. To hold an amount debited to the account of the borrower capitalised it should appear that the borrower had an opportunity of making the payment on the date of entry or within a reasonable time or period of grace from the date of debit entry or the amount falling due and thereby avoiding capitalisation. Any debit entry in the account of the borrower and claimed to have been capitalised so as to form an amalgam of the principal sum may be excluded on being shown to the satisfaction of the Court that such debit entry was not brought to the notice of the borrower and/or he did not have the opportunity of

making payment before capitalisation and thereby excluding its capitalisation.

(5) The power conferred by Sections 21 and 35A of the Banking Regulations Act, 1935 is coupled with duty to Act. Reserve Bank of India is prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter alia, deal with rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy.

(6) Agricultural borrowings are to be treated on a pedestal different from others. Charging and capitalisation of interest on agricultural loans cannot

be permitted in India except on annual or six monthly rests depending on the rotation of crops in the area to which the agriculturist borrowers belong.

(7) Any interest charged and/or capitalised in violation of RBI directives, as to rate of interest, or as to periods at which rests can be arrived at, shall be dis-allowed and/or excluded from capital sum and be treated only as interest and dealt with accordingly.

(8) Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC de hors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.

In view of the law having been settled with this judgment, it is expected henceforth from the banks, bound by the directives of the Reserve Bank of India, to make an averment in the plaint that interest/compound interest has been charged at such rates, and capitalised at such periodical rests, as are permitted by, and do not run counter to, the directives of the Reserve Bank of India. A statement of account shall be filed in Court showing details and giving

particulars of debit entries, and if debit entry relates to interest then setting out also the rate of, and the period for which, the interest has been charged. On the Court being *prima facie* satisfied, if a dispute is raised in that regard, of the permissibility of debits, the onus would be on the borrower to show why the amount of debit balance appearing at the foot of the account and claimed as principal sum cannot be so accepted and adjudged. This practice would narrow down the scope of controversy in suits filed by banking institutions and enable an expeditious disposal of the suits, the issues wherein are by and large capable of being determined by documentary evidence. RBI directives have not only statutory flavour, any contravention thereof or any default in compliance therewith is punishable under sub-section (4) of Section 46 of Banking Regulations Act, 1949. The Court can act on assumption that transactions or dealings have taken place and accounts maintained by banks in conformity with RBI directives.

We have dealt with the law governing the debtor and creditor relation-ship. We have not dealt with any provision or principle of taxation law whereunder deemed payment of interest consequent upon capitalisation and actual payment whenever made may be treated as capital or revenue which question shall have to be determined under the scheme of relevant statutory enactment.

Subject to the above we answer the reference in following terms :

(1) Subject to a binding stipulation contained in a voluntary contract between the parties and/or an established practice or usage interest on loans and ad-vances may be charged on periodical rests and also capitalised on remaining unpaid. The principal sum actually advanced coupled with the interest on periodical rests so capitalised is capable of being adjudged as principal sum on the date of the suit.

(2) The principal sum so adjudged is 'such principal sum' within the meaning of Section 34 of the Code of Civil Procedure Code, 1908 on which interest pendente lite and future interest i.e. post-decree interest, at such rate and for such period which the Court may deem fit, may be awarded by the Court.

(3) Corporation Bank v. D.S. Gowda and Anr., [1994] 5 SCC 213 and Bank of Baroda v. Jagannath Pigment & Chem. Have been correctly decided.

In Corporation Bank v. D. S. Gowda & Anr., [1994] 5 SCC 213 a batch of appeals against three decisions of Karnataka High Court, [reported as D.S. Gowda v. Corporation Bank, AIR (1983) Karnataka 143, H.P. Krishna Reddy v. Canara Bank, AIR (1985) Karnataka 228 and Bank of India v. Kamam Ranga Rao and Ors., AIR (1986) Karnataka 242] were disposed of and while doing so two decisions of Andhra Pradesh High Court, namely, K.C. Venkateswarlu v. Syndicate Bank, AIR (1986) AP 290 and State Bank of India, Eluru, Re, AIR (1986) AP291, were also noticed and dealt with, D.S. Gowda's case was of a commercial advance taken by

the borrower for the purpose of constructing residential flats on a building site allotted by Bangalore Development Authority. Interest at the rate of 16.5% per annum, with quarterly rests, was charged. Interest, penal interest and service charges were debited to the account and capitalised. In the cases of H.P. Krishna Reddy, (supra) and Kamam Ranga Rao (supra), loans were advanced for agricultural purposes. Directions made by Reserve Bank of India were violated and the interest was charged at rates far excess of the limits prescribed by the Reserve Bank, also by compounding at quarterly rests, not permitted by Reserve Bank. One of the questions having a bearing on the day to day transactions of loan/advance entered into by the banks was: Whether the bank is entitled to claim interest with periodical rests, e.g., a monthly rest, a quarterly rest, a six-monthly rest, or a yearly rest, or compound interest in any other manner, from a borrower who has obtained a loan or an advance for agricultural/commercial purposes, as the case may be? During the course of its judgment the Court observed (vide para 14) :- ".....charging of interest with periodical rests or compounding of interest would be allowed if there is evidence of the customer having acquiesced therein, provided the relation of banker and customer is subsisting. However, if the relationship undergoes a change into that of mortgagee and mortgagor by the taking of a mortgage, the charging of interest would be governed in

accordance with the terms of the mortgage. The taking of a mortgage to secure the fluctuating balance of an overdrawn account, being not inconsistent with the relationship of banker and customer, would not displace an earlier right to charge compound interest. Thus, the practice of bankers to debit the accrued interest to the borrower's current account at regular periods is a recognised practice." Their Lordships reversed the judgment of the Karnataka High Court which was under appeal and approved and affirmed view of the same High Court in *H.P. Krishna Reddy v. Canara Bank*, AIR (1985) Karnataka 228, and *Bank of India v. Kamam Ranga Rao*, AIR (1986) Karnataka 242. Universal banking practice of usually charging interest on periodical rests and com-pounding interest on remaining unpaid was specifically dealt with and approved. The principle relevant consideration which prevailed with the Court were : continuing judicial upholding of such practice over a length of time and the Reserve Bank of India by issuing circulars/directives from time to time and on paying 'adequate attention' having accorded its approval to permissibility of such practice but intervening in the interest of streamlining the same.

Bank of Baroda v. Jagannath Pigment & Chemicals & Ors., [1996] 5 SCC, 280] is a short judgment delivered by three-Judge Bench of the Court approving the two-Judge Bench decision of

Corporation Bank v. D. S. Gowda & Anr., [1994] 5 SCC 213

In Central Bank of India v. Ravindra and Ors., JT 2001 (9) SC 101, Hon'ble Justice R.C. Lahoti speaking for the Constitution Bench has laid down as follows : "Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC which governs the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced, the Court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner,"

LAW AS TO AWARD OF INTEREST PENDENTE LITE

Debt Recovery Appellate Tribunal - Delhi

State Bank Of India vs Jagdamba Medicos And Ors.

Decided on 28 March, 2002

(a) Before 1929 it was obligatory for the Court to direct the contractual rate of interest to be paid by the mortgagor on the sum adjudged in the preliminary decree from the date of suit till the date fixed for

payment as per Order XXXIV Rule 7(c)(i) respectively in suits for foreclosure, sale or redemption.

(b) But after 1929 amendment, because of the words used in the main part of the Order XXXIV Rule 11, namely, 'the Court may order payment of interest' it is no longer obligatory on the part of the Court while passing preliminary decree to require payment at the contractual rate of interest from the date of suit till the date fixed in the preliminary decree for payment of the amount.

(c) It is no longer obligatory to award the contractual rate after the date of suit and upto the date fixed for redemption as above.

(d) Even if the Court otherwise wants to award interest, the position after the 1929 and 1956 amendments is that the Court has discretion to fix interest from the date of suit under Order XXXIV Rule 11 (a)(i) up to the date fixed for payment in the preliminary decree, the same rate agreed in the contract, or, if no rate of interest was fixed, such rate as the Court deems reasonable.

(e) The Court has also power to award from the date of suit under Order XXXIV Rule 11(a)(iii) a rate of interest on cases, charges and expenses as per contractual rate or failing such rate at a rate not exceeding 6%. This is the position of discretionary power of the Court from the date of suit up to the date fixed in the preliminary decree as the date for payment.

(f) Order XXXIV Rule 11(b) so far as the period after the date fixed for payment is concerned, the Court, even if it wants to exercise to award interest up to the date of realization or actual payment, on the aggregate sum specified in Clause (a) Order XXIV Rule 11 could award interest at such rate as it deem reasonable."

APPROPRIATION FIRST TOWARDS INTEREST AND COSTS AND THEN TOWARDS PRINCIPAL UNLESS DECREE OTHERWISE DIRECTS

Bharat Heavy Electricals Ltd. vs. R.S. Avtar Singh and Company: MANU/SC/0837/2012 ; AIR 2013 SC 252

(a) The general rule of appropriation towards a decretal amount was that such an amount was to be adjusted strictly in accordance with the directions contained in the decree and in the absence of such directions adjustments be made firstly towards payment of interest and cost and thereafter towards payment of the principal amount subject, of course, to any agreement between the parties.

(b) The legislative intent in enacting sub-rules (4) and (5) is clear to the pointer that interest should cease to run on the deposit made by the judgment-debtor and notice given or on the amount being tendered outside the Court in the manner provided in Order XXI Rule 1 sub-clause (b), C.P.C.

(c) If the payment made by the judgment-debtor falls short of the decreed amount, the decree holder will be entitled to apply the general rule of appropriation by

appropriating the amount deposited towards the interest, then towards cost and finally towards the principal amount due under the decree.

(d) Thereafter, no further interest would run on the sum appropriated towards the principal. In other words if a part of the principal amount has been paid alongwith Interest due thereon as on the date of issuance of notice of deposit interest on that part of the principal sum will cease to run thereafter.

(e) In cases where there is a shortfall in deposit of the principal amount, the decree holder would be entitled to adjust interest and cost first and the balance towards the principal and beyond that the decree holder cannot seek to reopen the entire transaction and proceed to recalculate the interest on the whole of the principal amount and seek for re-appropriation.

Apex Court in case between V. Kala Bharathi v. Oriental Ins. Co. Ltd., MANU/SC/0262/2014 : 2014 (5) SCC 577 - It was held that if the amount deposited by the judgment-debtor falls short of the decretal amount, the decree holder is entitled to apply the rule of appropriation by appropriating the amount first towards interest, then towards costs and subsequently towards principal amount due under the decree; we are of the opinion that the appellants herein are entitled to the amount awarded by the Executing Court, as the amounts deposited by the judgment-debtor fell short of the decretal amount.

After such appropriation, the decree-holder is entitled to interest only to the extent of unpaid principal amount. Hence, interest be calculated on the unpaid principal amount.

EXHORBITANT INTEREST PROCEEDINGS

Manjunath vs. The State of Karnataka and Ors.:

MANU/KA/1705/2018 - It is also further held that remedy available to an aggrieved person is to approach the jurisdictional Court by filing a petition under Section 5 of the Exorbitant Interest Act, 2004, and seek redressal of their grievance and they cannot approach the jurisdictional police for redressal of their grievances or initiation of proceedings on the basis of such complaint would be contrary to provisions of Section 5 of the Act.

This Court in Criminal petition No. 102091/2015 disposed of on 17.12.2015 had quashed the proceedings for having not complied with Section 5 of Karnataka Prohibition of Charging Exorbitant Interest Act, 2004. It was held: "7. I have perused the grounds urged in the petition and also the documents produced by the learned counsel for the petitioner in support of his case. Looking to the allegations made in the complaint, the offences alleged are under Karnataka Prohibition of Charging Exorbitant Interest Act, 2004 i.e., under Sections 3 and 4. When that is so, the procedure contemplated

under Section 5 of the said Act is to be followed.

Section 5 of the said Act reads as follows: 5. Deposit of money and presentation of petition to Court and the procedure thereof.- (1) A debtor may deposit the money due in respect of a loan received by him from any person together with interest at the rate fixed by the State Government under section 28 of the Karnataka Money Lenders Act, 1961 into the Court having jurisdiction, along with a petition to record that the amount deposited is in full or part, satisfaction of the loan including the interest therefor, as the case may be. (2) The Court shall, on receipt of a petition under sub-section(1), refer a copy of the petition to the person mentioned in the petition, directing him to give his replies within a period of fifteen days as may be granted by the Court. The Court may, after due inquiry and after considering the versions of both the parties, pass orders recording the satisfaction of the loan and interest therefor in full or in part, as the case may be."

In the instant case also, there has been no such complaint to the jurisdictional Court by the borrowers alleging that petitioner had charged exorbitant interest as stated in the complaint. Thus, initiation of the prosecution against the petitioner on the basis of Police report is illegal. Records would clearly disclose that registration of the complaint by respondent No. 2 is without taking recourse Section 5 of the Exorbitant Interest Act, 2004, and such further proceedings would be illegal.

Justice S. Vimala of Madras High Court in the case of M. Kokila vs. A. Dhanalakshmi : MANU/ TN/ 0933/ 2014 - 2014 (4) CTC 805 - The next issue to be considered is with reference to rate of interest. The learned counsel for the defendant pleaded for lesser rate of interest, relying upon the provisions of Tamilnadu Prohibition of Charging Exorbitant Interest Act 2003. As per the provisions of the said Act, no person shall charge exorbitant interest on any loan advanced by him.

10.1. Under Section 2(5) 'Kanthu Vatti' means an interest which will work out to interest rate more than that fixed by the Government under Section 7 of the Money Lenders Act. Under Section 2(6) 'loan' means an advance of money for daily vatti, hourly vatti, kanthu vatti, meter vatti or thandal. Under Section 7 of the Money Lenders Act, Government is empowered to fix the interest and charges allowed to money lenders.

10.2. Government of Tamil Nadu has issued notification, fixing the rate of interest at 9% per annum (with simple interest in respect of secured loan and @ 12% per annum in respect of unsecured loan). This notification has been published in Gazette on 06.07.1979.

10.3. Therefore, the plaintiff can claim interest only @ 12% per annum from the date of pro note to till the filing of the suit. Thereafter, the plaintiff is entitled to interest on the principal amount at 6% per annum

from the date of plaint to till the date of decree and from date of decree to till the date of realisation.

10.4. Learned counsel for the appellant has given a memo of calculation. According to the calculation, the interest payable from the date of pronote to date of plaint is Rs. 23,050/- (@12%). The defendant is liable to pay a sum of Rs. 1,73,050/- as on 13.04.2006 and thereafter with interest @ 6% on Rs. 1,50,000/- till the date of payment.

WHEN NO INTEREST IS SPECIFIED IN THE INSTRUMENT

Section 80 of Negotiable Instruments Act however is relevant in this regard and reads as under: Interest when no rate specified.-When no rate of interest is specified in the instrument, interest on the amount due thereon shall, (notwithstanding any agreement relating to interest between any parties to the instrument), be calculated at the rate of (eighteen per centum) per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs. Explanation- When the party charged is the endorser of an instrument dishonoured by non-payment, he his liable to pay interest only form the time that he receives notice of the dishonour.

In Nath Sah v. Lal Durga Sah MANU/UP/0198 /1935 : AIR 1936 Allahabad 160, a Division Bench of Allahabad High Court held that where no rate of interest is specified in a written instrument, then, notwithstanding any contract to the contrary, the interest is to be calculated at the rate of 6% per annum and the date from which such interest should be calculated should be the date on which the Principal amount ought to have been paid. In that case the suit was based on a promissory note which contained no mention of any liability to pay interest and the defendant had denied his liability to pay any interest.

In Ghasi Patra v. Brahma Thati MANU/OR/0014 /1962 : AIR 1962 Orissa 35, the pronote payable on demand did not provide for payment of interest. It was contended before the High Court that under Section 80 of Negotiable Instruments Act, interest could have been allowed only from the date of demand and not for any earlier period and since no demand was proved in the case, no interest should have been allowed from the date of the execution of the pronote till the date of the suit. It was held that the plaintiff was entitled to interest under Section 80 of Negotiable Instruments Act from the date of execution of the pronote. In taking this view, the High Court followed the decision of Bombay High Court in Ganpat Tukaram v. Sopana Tukaram MANU/MH/0133/1927 : AIR 1928 Bombay

35, where it was held that where a promissory note is payable on demand, but is silent as to interest, the interest can be awarded under Section 80 of Negotiable Instruments Act at 6% per annum from the date of the promissory note. A Division Bench of Patna High Court in *Bishun Chand v. Audh Bihari Lal* MANU/BH/0022/1917 : AIR 1917 Pat 533 also took the view that if the hand note is payable on demand but does not provide for the payment of interest, it carries interest at the rate of 6% per annum from the date of execution of the hand note until the realisation of the debt.

In P. Mohan v. Basavaraju MANU/KA/0058/2003 : **AIR 2003 Karnataka 213**, the suit was based on cheques which when presented were dishonoured. There was an agreement between the parties not to pay interest. It was held by Karnataka High Court that in view of the provisions of Section 80 of Negotiable Instruments Act, the defendant/appellant would be entitled to pay interest and that agreement between the parties not to pay interest would be valid only until the cheques were dishonoured.

The State of Karnataka and Ors. vs. The Karnataka Pawn Brokers Assn. and Ors. AIR 2018 SC 1441 : **MANU/SC/0257/2018** - In *Independent Thought v. Union of India and Anr.* MANU/SC/1298/2017 : (2017) 10 SCC 800 this Court held that arbitrariness must be writ large to make it un-constitutional.

Whether the interest should be paid or not is a matter which parties decide amongst themselves. Supposing, there is a contract providing that no interest will be paid on the amount advanced; can it be said that such a Clause in the contract is so arbitrary that the contract becomes void or becomes inoperative. We do not think so. If we make reference to every day transactions, banks do not pay interest on current account. Supposing, a person's money lies in the current account for 3-4 years he cannot interest only on the ground that the bank would have utilized this money for commercial purposes. There are various instances where schools, other educational institutions, clubs, societies ask for refundable deposits on which no interest is payable. These are accepted to be normal routine practices because these bodies are not engaged in commercial activities. Even a pawn broker pays no interest on the value of the security pledged with him. Contracts providing for non-payment of interest on earnest money and security deposits have been considered in the context of the Arbitration Acts. The Courts have held that in view of the agreement entered into between the parties, the arbitrator cannot award interest prior to the date of passing of the award. In fact, this Court has clearly held that the arbitrator cannot award pendente lite interest¹. Though these authorities do not directly deal with the issue with

¹ MANU/SC/ 1235/2017 : (2017) 9 SCC 611

which we are concerned, it is obvious that in all these cases, the Court has not construed the provision of the contract providing for non-payment of interest to be void. The said provision has, in fact, been legally enforced. We may, however, note that under the Arbitration Act of 1940, this Court held that the arbitrator could award pendente lite interest¹ but under the Arbitration and Conciliation Act, 1996 the arbitrator cannot award interest prior to the date of award². The Clause for non-payment of interest has not been held void in any case.

WHEN DEFENDANT POSSESSING DOCUMENT BELONGING TO PLAINTIFF

Supreme Court in Narbada Devi Gupta Vs. Birendra Kumar Jaiswal (MANU/SC/0862/2003 : AIR 2004 SC 175) had occasion to consider the question of burden of proof where the signatures on the back portion of 3 rent receipts were admitted and the documents having been admitted and marked as exhibits. Those documents were produced by the defendant to substantiate his plea that he was a

¹ MANU/SC/0142/1992 : (1992) 1 SCC 508

² MANU/SC/1159/2009 : (2009) 12 SCC 26, - MANU/SC/0625 / 2010 : (2010) 8 SCC 767, - MANU/SC/0712/2015 : (2015) 9 SCC 695

tenant of the building. The Supreme Court noticed that even after the specific plea in the written statement of the defendant claiming status of a tenant on the basis of rent receipts, the pleadings in the plaint were not amended by the plaintiff to explain how on the back of the printed rent receipts he happened to put his signatures. No consequential amendment was made in the plaint taking a plea of fraud and forgery of rent receipts. In that case the rent receipts were admitted in evidence without objection and the signatures on the rent receipts were also admitted. The Supreme Court held that the onus of proof was on the plaintiff to explain as to how blank printed rent receipts came to be signed by him on their back portions.

BURDEN OF PROOF

The Supreme Court in Kundan lal Vs. Custodian, Evacuee Property (MANU/SC/0422/1961 : AIR 1961 SC 1316) has held as follows: The phrase "burden of proof" has two meanings - One, the burden of proof as a matter of law and pleading and the other the burden of establishing a case, the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or

documentary evidence or admissions made by opposite party; it may comprise circumstantial evidence or presumptions of law or fact. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under S. 101 of the Evidence Act, "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist". Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved, the rule of presumption laid down in S. 118 of the Negotiable Instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff; but as soon as the execution is proved, S.118 of the Negotiable Instruments Act imposes a duty on the court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and, if he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling the burden may likewise shift again to the plaintiff. Again it is held in the

same judgment as follows: A plaintiff who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular consideration, should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, S. 114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court, can under certain circumstances rebut the presumption of law raised under S.118 of the Negotiable Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact.

CAPITALISATION OF INTEREST AND PRINCIPAL AND TREATING IT AS PRINCIPAL AMOUNT DUE SHOULD NOT BE DONE.

AIR 2001 SC 3095 [Central Bank of India v. Ravindra and others], a Five Judge Constitution Bench of Supreme Court has laid down the following guidelines:-

(1) Though interest can be capitalised on the analogy that the interest falling due on the accrued date and remaining unpaid, partakes the character of amount advanced on that date, yet penal interest, which is charged by way of penalty for non-payment, cannot be capitalised. Further interest, i.e. interest on interest, whether simple, compound or penal, cannot be claimed on the amount of penal interest. Penal interest cannot be capitalised. It will be opposed to public policy.

(2) Novation, that is, debtor entering into a fresh agreement with creditor undertaking payment of previously borrowed principal amount coupled with interest by treating the sum total as principal, any contract express or implied and an express acknowledgement of accounts, are best evidence of capitalisation. Acquiescence in the method of accounting adopted by the creditor and brought to the knowledge of the debtor may also enable interest being converted into principal. A mere failure to protest is not acquiescence.

(3) The prevalence of banking practice legitimatises stipulations as to interest on periodical rests and their capitalisation being incorporated in contracts. Such stipulations incorporated in contracts voluntarily entered into and binding on the parties shall govern the substantive rights and obligations of the parties as to recovery and payment of interest.

(4) Capitalisation method is founded on the principle that the borrower failed to make payment though he

could have made and thereby rendered himself a defaulter. To hold an amount debited to the account of the borrower capitalised it should appear that the borrower had an opportunity of making the payment on the date of entry or within a reasonable time or period of grace from the date of debit entry or the amount falling due and thereby avoiding capitalisation. Any debit entry in the account of the borrower and claimed to have been capitalised so as to form an amalgam of the principal sum may be excluded on being shown to the satisfaction of the Court that such debit entry was not brought to the notice of the borrower and/or he did not have the opportunity of making payment before capitalisation and thereby excluding its capitalisation.

(5) The power conferred by Sections 21 and 35A of the Banking Regulations Act, 1935 is coupled with duty to Act. Reserve Bank of India is prime banking institution of the country entrusted with a supervisory role over banking and conferred with the authority of issuing binding directions, having statutory force, in the interest of public in general and preventing banking affairs from deterioration and prejudice as also to secure the proper management of any banking company generally. Reserve Bank of India is one of the watchdogs of finance and economy of the nation. It is, and it ought to be, aware of all relevant factors, including credit conditions as prevailing, which would invite its policy decisions. RBI has been issuing directions/circulars from time to time which, inter

alia, deal with rate of interest which can be charged and the periods at the end of which rests can be struck down, interest calculated thereon and charged and capitalised. It should continue to issue such directives. Its circulars shall bind those who fall within the net of such directives. For such transaction which are not squarely governed by such circulars, the RBI directives may be treated as standards for the purpose of deciding whether the interest charged is excessive, usurious or opposed to public policy.

(6) Agricultural borrowings are to be treated on a pedestal different from others. Charging and capitalisation of interest on agricultural loans cannot be permitted in India except on annual or six monthly rests depending on the rotation of crops in the area to which the agriculturist borrowers belong.

(7) Any interest charged and/or capitalised in violation of RBI directives, as to rate of interest, or as to periods at which rests can be arrived at, shall be disallowed and/or excluded from capital sum and be treated only as interest and dealt with accordingly.

(8) Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC de hors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-

decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.”

IN A SUIT FOR MONEY DECREE – PAYMENT TOWARDS INTEREST AND COSTS TO BE ADJUSTED AT FIRST

Bharat Heavy Electricals Ltd. vs. R.S. Avtar Singh and Company: MANU/SC/0837/2012 Claimant can seek to apply rule of appropriation in respect of amount, first towards interest and costs and then towards principal, unless decree otherwise directs.

NO COURT CAN RE-OPEN BANKING TRANSACTIONS STATING INTEREST CHARGED IS EXCESSIVE

BANKING REGULATION ACT, 1949 Section 21A as amended in 1984 states - Rates of interest charged by banking companies not to be subject to scrutiny by courts - "Notwithstanding anything contained in the Usurious Loans Act, 1918 (10 of 1918), or any other law relating to indebtedness in force in any State, a transaction between a banking company and its debtor shall not be re-opened by any court on the ground that the rate of interest charged by the banking company in respect of such transaction is excessive."

State Bank of India vs. Yasangi Venkateswara Rao 1999 (2) SCC 375, AIR 1999 SC 896, MANU/SC/0027/1999 "We are unable to understand as to how the High Court could come to the conclusion that the Parliament had no jurisdiction to enact Section 21A. There can be no doubt that Section 21A deals with the question of the rate of interest which can be charged by a banking company. Entry 45 of List I of the Seventh Schedule clearly empowers the Parliament to legislate with regard to banking. The enactment of Section 21A was clearly within the domain of the Parliament. The said Section applies to all types of loans which are granted by a banking company, whether to an agriculturist or a non-agriculturist, and, therefore, reference by the High Court to Entry 30 of List II was of no consequence. In our opinion, the said Section 21A had been validly enacted..... We also find it difficult to agree with the observation of the High Court that normally when a security is offered in the case of mortgage of property, charging of compound interest would be regarded as excessive. Entering into a mortgage is a matter of contract between the parties. If the parties agree that in respect of the amount advanced against a mortgage compound interest will be paid, we fail to understand as to how the court can possibly interfere and reduce the amount of interest agreed to be paid on the loan so taken. The mortgaging of a property is with a view to secure the loan and has no relation whatsoever with the quantum of interest to be charged."

INTEREST MERGES INTO PRINCIPAL - RBI GUIDELINES

Indian Bank v. Gurcharan Singh AIR ONLINE 2018 DEL 1499

"....Impugned judgment of the trial court is clearly erroneous because once loan amount is granted of Rs.3,00,000/- from 13.1.1989, and which loan amount carries interest compounded quarterly as per RBI Guidelines and on account of non- payment of interest the same merges into the principal, suit amount which is total of the loan granted plus interest has to be awarded. This is held by the Constitution Bench judgment of the Supreme Court in the case of Central Bank of India Vs. Ravindra and Ors., (2002) 1 SCC 367. It is also noted that the appellant/plaintiff proved on record the acknowledgements of debts dated 17.10.1991/Ex.P-12, 4.10.1994/Ex.P-13 and these acknowledgments of debts will acknowledge the liability of the amount payable as per the dates given in the acknowledgment letters. This is another reason why the trial court has wrongly decreed the suit only for a sum of Rs.3,00,000/- being the original loan amount along with interest at 12.5% per annum."

INTEREST LIMITS FOR SECURED LOAN AND UNSECURED LOAN

Baba Corporate vs. V. Narayana Murthy: MANU/KA/ 0157/2015 - Further, it is the contention of the respondents-accused that the appellant company was registered under the provisions of the Reserve Bank of India Act and in case of secured loan, it has to charge interest at the rate of 14% p.a. and in case of unsecured loan, it is at 16% p.a. The claim of the appellant company that respondents accused had agreed to avail the loan amount at the rate of 30% p.a. is against the provisions of Sections 28 and 29 of the Karnataka Money Lenders Act so also to the provisions of RBI Act. The further contention of the respondents accused is that when they have made the payment by cheques and by cash, the appellant-company has to first appropriate the amount paid towards loan and calculate the interest thereon and find out as to what is the principal amount due and then only, it can ascertain as to what is the due amount determined to be recoverable from the respondents accused. **I have perused the notification dated 28.8.2003 issued from the Government of Karnataka**, wherein it is stated that in exercise of the powers conferred under Sub-section (1) of Section 28 of the Karnataka Money Lenders Act, 1961 (Karnataka Act No. 12/1961) and in suppression, all previous orders or notifications in this regard, the Government of Karnataka hereby fixed the following maximum rates of interest in respect of the secured and unsecured loans for all

classes of business of money lending: "(i) Secured loan... 14% p.a. (ii) Unsecured loan... 16% p.a."

.....Prima facie, the notification dated 28.8.2003 goes to show that the interest restriction is also not followed by the appellant company and there is no calculation sheet according to the said rates to know the recoverable debt amount due from the respondents-accused.

CHAPTER - 9

JOINT FAMILY DEBTS AND RECOVERY

AT SALE TRANSACTION ALL ADULT MEMBERS SHOULD BE CONSULTED

In 1964 Supreme Court 1385 (Balmukand V. Kamla Wati and others) it has been held that "manager agreeing to sell property of joint family, the Court has to analyse as to whether the said transaction is beneficial to joint family and further, all adult members must be consulted."

FATHER DEBT AND BROTHER DEBT & ITS LIABILITY ON OTHERS UNDER HINDU LAW

Court in the case of (Mariammal and another vs. Subbuthai and others) reported in 2013 (5) CTC 49 wherein it was held that a Hindu father can very well sell or mortgage ancestral property whether movable or immovable, including the interest of his son, grand sons and great-grandsons for the payment of his own debt, provided that such debt is not incurred for immoral or illegal purpose. In the present case, as mentioned above, there is no whisper in the plaint as to whether the father of the plaintiffs' resorted to immoral or illegal activities and the sale consideration received out of the sale made in favour of the defendant was utilised for the purpose of indulging in any immoral activities.

QUOTED:- In AIR 1992 Madras 203 (Sarangapani V. K.V.Parthiban and others), wherein this Court has

held that "under Hindu Law, in case of alienation of Hindu undivided family properties for payment of debts, no doubt the debts incurred by brother manager will stand on a different footing from the debts incurred by a father manager, but only to this limited extent, namely, in the case of a brother manager, the debts have to be for the benefit of the family before they are said to be binding on the other members of the family. In case of a father manager, even if the debts are not for the benefit of the family, they are binding on the members of the family if they are antecedent debts, which are not tainted by illegality or immorality. But for that, there is no other difference between the two sets of debts.

On the basis of the decision referred to supra, it is easily discernible that if a transfer is made in respect of property of Hindu Joint Family by brother manager a legal necessity must be in existence, whereas, if a transfer is made by father manager, legal necessity need not be proved and at the same time, the said transfer is binding upon other members of the joint family. Therefore, it is quite clear that father manager is having vast power of alienation of Hindu joint family properties. The only limitation is that the so- called antecedent debt should not be tainted with immorality or illegality. In the instant case, such allegation have not been made against the father of the plaintiff in the plaint.

Honourable Supreme Court in the case of (Manibhai and others vs. Hemraj and others) (1990) 3 Supreme

Court Cases 68 wherein it was held that when the alienation of joint family is for a legal necessity by the father to satisfy the debts contracted or even for his personal benefit it is binding on their sons on the basis of doctrine of pious obligation if the alienation is not avyavharik or tainted with immorality or illegality. Further, for judging such validity of transaction, each transaction should be independently examined.

In 1971 Supreme Court 776 (Raghubanchmani Prasad Narain Singh V. Ambica Prasad Singh (dead) by his legal representatives and others) the Hon'ble Apex Court has held that "alienation by father manager of joint Hindu family even without legal necessity is voidable and not void."

In (1996) 8 Supreme Court Cases 54 (Sri Narayan Bal and others Vs. Sridhar Sutar and others), the Hon'ble Apex Court has held that "Karta of Hindu joint family is having unfettered right of alienation of joint family property and the same is binding upon other members."

POWER OF KARTHA TO BORROW MONEY

Honourable Supreme Court in the case of (Venkatesh Dhonddev Deshpande vs. Sou. Kusum Dattatraya Kulkarni and others) reported in **(1979) 1 Supreme Court Cases 98** wherein it was held that the Karta or Manager of joint Hindu family has implied authorities to borrow money for family purposes and such debts are binding on the other co-parceners and the liability

of the co-parceners in such a case does not cease by subsequent partition.

PIOUS OBLIGATION OF SONS

Honourable Supreme Court in the case of (S.M. Jakati vs. S.M. Borkar) reported in 1959 SCR 1384 = AIR 1959 SC 282 wherein it was held that when the sons do not challenge the liability of their interest in the execution of the decree against the father and the Court, after attachment and proper notice of sale sells the whole estate and the auction purchaser pays for the whole estate, then the mere fact that the sons were co nominee not brought on the record would not be sufficient to defeat the rights of the auction purchaser or put an end to the pious obligation of the sons.

In BHUPATIRAJU SREERSMARAJU AND OTHERS VS. NADIMPALLI PULLAM RAJU AND ANOTHER (AIR 1963 Andhra Pradesh 403) it has been laid down as follows: "Where a new business is started by a sole surviving co-parcener of Mithakshara family the business becomes from its origin a family business and the minor members of the family born subsequently are not competent to say that the risk and liability of the new business cannot be imposed on them. The risk and liability has been taken by the family and the new comers in the family must share the debts and the new business along with other assets and liability of that family."

Hemraj alias Babu Lal and Ors. vs. Khem Chand and Ors. - PRIVY COUNCIL - : MANU/PR/0053/1943

Under the Hindu law a son is under a pious obligation to pay his father's debts to save him from punishment in a future state for non-payment of his debts. "According to the notions of Smriti writers it is regarded as sinful to remain in debt, and a debtor's salvation is deeply imperilled if he dies indebted. According to Vrihaspati, a person who does not repay his debt 'will be born in his creditor's house' as a slave or servant or woman or a quadruped.' According to other writers a person dying in debt goes to hell. A duty is therefore cast upon every person to discharge debts incurred by him": Thus, if the father dies without discharging his debts, a Hindu son is obliged to pay his undischarged debts and relieve him from his sins.

As observed by this Board in *Girdharee Lall v. Kantoo Lall* (1874) L.R. 1 I.A. 321, 331: "It being the pious duty of the son to pay his father's debts, the ancestral property, in which the son as the son of his father acquires an interest by birth, is liable to the father's debts." But this obligation is not unqualified, for the son is not bound to pay his father's debts if the debts are *avyavaharika*.

The Smriti texts on which this qualification is based will be found in the learned judgment of Mookerjee J. in *Chhakauri Mahton v. Ganga Prasad*

(1911) I.L. R.39 C. 862. Their Lordships will in this judgment refer only to one text, the text of Usanas (ascribed also to Vyasa), the only text which uses the term *avyavaharika* (na *vyavaharikam* in the original). After enumerating certain specific debts, more or less in the same language as used by the other Smriti writers, Usanas adds a supplementary category of debts which the sons need not pay which are *avyavaharika*. The text of Usanas appears in Vijnaneswara's commentary on ch. II., v. 47, of Yajnavalkya, which lays down exceptions to the general rule relating to son's liability to pay the father's debts contained in v. 50.

These verses are as follows: Ch. II., v. 50. "When the father is abroad, or in difficulties, his debt proved by witnesses if undisputed, should be paid by the son and grandson."

Ch. II., v. 47. The son shall not pay the [paternal debts] contracted for wines, lust, gambling, or due on account the unpaid [portion] of a fine or toll or [on account of] an idle promise. In his commentary to this verse, Vijnaneswara refers to the text of Usanas which is: "A fine, the balance of a fine, likewise a bribe, or a toll or the balance of it, are not to be paid by the son, neither shall he discharge a debt which is *avyavaharika* (na (not) *vyavaharikam*)."

There has been much difference of opinion as regards the precise significance of the term *avyavaharika*. Colebrooke translates it as meaning "debts for a cause repugnant to good morals"; Mandlik

renders it as "not proper," and Sir Dinshaw Mulla in his "Hindu Law" accepts Colebrooke's translation. The term has also been interpreted in various judgments by courts in India, but the decisions are not all uniform. The Bombay High Court translates the term as "unusual or not sanctioned by law... Put into simple English, the texts amount to this: that the son is not to be held liable for debts which the father ought not, as a decent and respectable man, to have incurred. He is answerable for debts legitimately incurred by his father: not for those attributable to his failings, follies or caprices": *Durbar Khachar v. Khachar Harsur* (1908) I.L.R. 32 B. 348, 351. This decision has been disapproved in subsequent decisions in Bombay, and by other High Courts also. Mookerjee J. renders the term as equivalent to "not lawful, usual or customary" (*Chhakauri Mahton v. Ganga Prasad* (1911) I.L.R. 39 C. 862), while Sadasiva Iyer J. paraphrases it as "a debt which is not supportable as valid by legal arguments, and on which no right could be established in the creditor's favour in a court of justice": *Venugopala Naidu v. Ramanadhan Chetty* (1912) I.L.R. 37 M. 458, 460. Many of the interpretations given to the term have been collected by Patkar and Tyabji JJ. in *Bal Rajaram Tukaram v. Maneklal Mansukhbhai* (1931) 1. L.R. 56 B. 36. Its meaning has been considered in other decisions also (see *Govindprasad v. Raghunathprasad* I.L.R. [1939] B. 533; *Ramasubramania v. Sivakami Ammal* (1925) A.I.R. (Mad.) 841). Their Lordships do

not think that any useful purpose will be served by reviewing these and the other decisions brought to their notice, as in their opinion the principles with reference to which the term *avyavaharika* should be interpreted, and by which this case should be decided, are sufficiently clear and do not conflict with those decisions. They will now refer to those principles.

If the doctrine of pious obligation is to be given full effect, there cannot be any doubt that a Hindu son should be held liable for every undischarged debt of his father, for nothing can be nobler than to obtain complete exemption for the father from all penalties which might follow from the non-discharge of his debts; but this position is not maintained. That the doctrine has reference to the nature or character of the debt which creates the liability can hardly be disputed; this appears from the following pronouncement made by Knight Bruce L.J. in *Hunoomanpersaud Panday's case* (1856) 6 Moo. I.A. 393, 421: "Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate...."

In *Girdharee Lall v. Kantoo Lall* L.R. 1 I.A. 321, 331, Sir Barnes Peacock quotes the above rule and then proceeds as follows: "It is necessary, therefore, to see what was the nature of the debt for the payment

of which it was necessary to raise money by the sale of the property in question. If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it...." This also makes clear the connexion between the nature of the debt and the liability to pay it. That the duty cast on the son being religious or moral, the character of the debt should be examined from the standpoint of justice and morality appears to be fairly clear from the decisions. In this connexion regard may also be had to the debts mentioned in the texts which the son need not pay, most of which are of an objectionable character. It also appears to be clear on principle, and on authority, that examination of the nature or character of the debt should be made with reference to the time when it originated, in other words, when the liability was first incurred by the father. If on such examination it is found that at its inception the debt was not tarnished or tainted with immorality or illegality, then it must be held that it would be binding on the son.

This principle, stated as Rule 1 by Venkatasubba Rao and Madhavan Nair JJ. in *Ramasubramania v. Siva Kami Ammal* (1925) A.I.R. (Mad.) 845, 852, in language almost identical, is amply borne out by the numerous authorities which they have examined. The rule is not rigid, but has to be applied with reference to the circumstances of each case. These principles, which are implicit in the notion of "pious obligation," and are also deducible from the

decisions, should be kept in mind in interpreting the term *avyavaharika* used in the text. The decisions which their Lordships have examined proceed on the ground common to them all, that debts in the nature of *avyavaharika* are debts which would be comprised in the expression "illegal or immoral debts." Having regard to the principles underlying the rule of "pious obligation," which forms the foundation for the son's liability, their Lordships think that the translation of the term *avyavaharika* as given by Colebrooke makes the nearest approach to the true conception of the term as used in the *Smriti* text, and may well be taken to represent its correct meaning. In their Lordships' view, the term does not admit of a more precise definition. When a particular debt is called in question, it will be the duty of the courts to examine its nature in the light of the principles mentioned above, which are not exhaustive but only basic, and to see whether in the circumstances it is of the kind which will give exemption to the son from the liability of paying it, on the ground that it is repugnant to morals. It has now been definitely established by the decision of this Board in *Toshanpal Singh v. District Judge of Agra* (1934) L.R. 61 I.A. 350, that a son is not liable to pay a debt created by his father which would render the father liable to criminal prosecution.

S. M. Jakati & Another vs S. M. Borkar & Others
1959 AIR 282, 1959 SCR Supl. (1)1384 ... the
 Supreme Court observed about the term

'Avyavaharika' (p. 286): ...This term has been variously translated as being that which is not lawful or what is not just or what is not admissible under the law or under normal conditions. Colebrooke translated it as 'a debt for a cause repugnant to good morals'. There is another track of decision which has translated it as meaning 'a debt which is not supported as valid by legal arguments'. The Judicial Committee of the Privy Council in *Hemraj alias Babu Lal v. Khem Chand* MANU/PR/0053/1943, held that the translation of the term as given by Colebrooke makes the nearest approach to the true conception of the term used in the 'Smrithis' texts and may well be taken to represent its correct meaning and that it did not admit of a more precise definition.

In *Toshanpal Sing v. District Judge of Agra* MANU/PR/0068/1934, the Judicial Committee held that drawings of monies for unauthorised purposes, which amounted to criminal breach of trust under Section 405 of the Indian Penal Code, were not binding on the sons, but a civil debt arising on Recount of the receipt of monies by the father which were not accounted for could not be termed "A vyavatiariku.

(1) that the liability of the sons to discharge the debts of the father which are not tainted with immorality or illegality is based on the pious obligation of the sons which continues to exist in the lifetime and after the death of the father and which does not come to an end as a result of partition of the joint family property. All

that results from partition is that the right of the father to make an alienation comes to an end.

(2) Where the right, title and interest of a judgment-debtor are set up for sale as to what passes to the auction-purchaser is a question of fact in each case dependent upon what was the estate put up for sale, what the Court intended to sell and what the purchaser intended to buy and did buy and what he paid for.

(3) The words "right, title and interest" occurring in s. 155 of the Bombay Land Revenue Code have the same connotation as they had in the corresponding words used in the Code of Civil Procedure existing at the time the Bombay Land Revenue Code was enacted.

(4) In execution proceedings it is not necessary to implead the sons or to bring another suit if severance of status takes place pending the execution proceedings because the pious duty of the sons continues and consequently there is merely a difference in the mode of enjoyment of the property.

(5) The liability of a father, who is a managing director and who draws a salary or a remuneration, incurred as a result of negligence in the discharge of his duties is not an avyavaharika debt as it cannot be termed as "repugnant to good morals"

Dhondopant Madhavrao Inde vs. Ashok Haribhau Patil : MANU/MH/0299/1977 - 1978 MhLJ 773 -

In our opinion, what is stated above by the Privy

Council and the Supreme Court is enough to show that, where the father is convicted in respect of the embezzlement, as in the present case and avoided imprisonment, by selling the property, it cannot be said that the son's share in the property is also bound, because the debt is 'vyavaharika'.

Amrit Lal v. Jayantilal MANU/SC/0195/1960:

[1960] 3 SCR 842, by Gajendragadkar J. (as he then was), in the course of the discussion of the doctrine of pious liabilities of the sons, as under (p. 966): This doctrine inevitably postulates that the father's debts which it is the pious obligation of the sons to repay must be vyavaharik. If the debts are not vyavaharik or are avyavaharik the doctrine of pious obligation cannot be invoked. The expression 'avyavaharik' which is generally used in judicial decisions has been based on the text of Usanas which has been quoted by Mitakshara in commenting on the relevant text of Yajnavalkya, (Yajnavalkya, ii, 47), According to Usanas, whatever is not vyavaharik has not to be paid by the son. 'Navyavahaarikam' are the words used by Usanas, and put in a positive form they mean 'avyavaharik'. Colebrooke has translated these words as meaning 'debt for a cause repugnant to good morals'. These words have received different interpretations in several decisions. Sometimes they are rendered as meaning 'a debt which as a decent and respectable man the father ought not to have incurred', *Durbar Khachar v. Khachar Harsur*

ILR(1908) 32 Bom. 348 : 10 Bom. L.R. 297, or, 'not lawful or customary', Chhakauri Mahton v. Ganga Prasad (1911) I.L.R. 39 Cal. 862 a, or, 'not supportable as valid by legal arguments and on which no right could be established in a Court of justice in the creditor's favour', Venugopala Naidu v. Ramanadhan Chetty ILR (1912) Mad. 458 : AIR [1914] Mad. 654. But it appears that in Hemraj v. Khem Chand MANU/PR/0016/1943, the Privy Council has, on the whole, preferred to treat Colebrooke's translation as making the nearest approach to the real interpretation of the word used by Usanas but whatever may be the exact denotation of the word, it is clear that the debt answering the said description is not such a debt as the son is bound to pay, and so as soon as it is shown that the debt is immoral the doctrine of pious obligation cannot be invoked in support of such a debt.

GUIDELINES FRAMED BY RAJASTHAN HIGH COURT IN CASE PARTITION SUITS AND DEBT RECOVERY PROCEEDINGS

Mohan Lal And Anr. vs Dwarka Prasad And Ors. AIR 2007 Raj 129 following guidelines and directions emerge:

(i) That while Civil Courts still remain appropriate forums and can continue to decide inter-party civil rights in the cases involving civil rights of the parties like in the cases of partition, cancellation of sale deed,

gift deed, right of pre-emption, redemption of mortgage etc. and the bar contained in Section 34 of the Securitisation Act is not absolute and does not debar Civil Courts to entertain such suits, however, no suit or injunction in any Civil Court can be allowed to prohibit and debar the measures taken by banks and financial institutions under Securitisation Act, 2002 or under R.D.B. Act, 1993, except as specified below in para (ii).

(ii) In cases of partition suits of ancestral property owned by a Hindu Undivided Family which has been mortgaged by one or more of the coparceners, without other coparceners being guarantors or borrowers of the bank or financial institution, the Bank, financial institution or Debt Recovery Tribunal cannot proceed to take over and sell, transfer or otherwise alienate the said ancestral undivided property unless and until the share of the particular borrower-coparcener is determined at the instance of such borrower-coparcener or the bank itself.

(iii) That the cut-off date excluding the jurisdiction of the Civil Court in respect of measures specified Under Section 13(4) of the Securitisation Act is the date when such measures are taken after expiry of notice period Under Section 13(2) of the Act and after such cut-off date no civil suit or injunction barring or prohibiting the right of the banks and financial institutions with respect to measures Under Section 13(4) of the Act can adversely affect the bank nor such injunction would be binding on the bank or financial institution,

except the cases of exception specified in para (ii) above.

(iv) From the said cut-off date if any such third party has a pending claim or intends to claim his right, title or interest over the property, which is security of the bank or financial institution, the remedy opens for him before the Debt Recovery Tribunal Under Section 17(1) of the R.D.B. Act and he can raise his objection or bring it to the notice of the Tribunal the fact of pendency of such civil suit and thereafter the Tribunal shall decide such objection within 60 days, as stipulated in Section 13(5) of the Act and hold either way as to whether a note to the effect of pending litigation has to be made by the bank or financial institution concerned in the notification, advertisement for sale and conveyance deed, if any, executed in exercise of their powers Under Section 13(4) of the Act in favour of any third party, and also whether to allow the Bank or financial institution to proceed further under these special enactments against the security or mortgaged property at all or not.

(v) In case upon adjudication of right, title or interest of any third party in a civil suit is decreed in his favour, such party upon such decree becoming final, shall be entitled to follow the whole or the part of the property, which formed security of the bank or the financial institution concerned and claim back either the suit property from the successor-in-title or to claim damages in the alternative for the same.

(vi) If in such civil suits filed for determination of civil rights between the parties including the borrower, who has mortgaged the suit property in whole or in part with the bank or financial institution, who have initiated steps Under Section 13(4) of the Act, the banks and financial institutions would be free to apply to the competent Civil Court and upon such application the bank or financial institution shall be deleted from the array of defendants and no injunction granted by the Civil Court would bind the bank or financial institution in respect of measures taken Under Section 13(4) of the Act, except in the cases relating to partition of Joint Hindu Undivided Family ancestral property.

RIGHT OF PLAINTIFFS' TO CLAIM PARTITION IN THE SUIT SCHEDULED PROPERTIES, IF THEY PROVE THEY ARE ANCESTRAL JOINT FAMILY PROPERTIES, CANNOT BE DEPRIVED OF AS CONTENDED BY THE BANK

In Krishna v. Kedarnath AIR 2006 Kant 21, the Division Bench of Karnataka High Court referring to Para 51 of the judgment of Supreme Court in *Mardia Chemical's* case held that while the bank can enforce its security interest for realization of its amount, right of plaintiffs' to claim partition in the suit scheduled properties, if they prove they are ancestral Joint family properties, cannot be deprived of as contended by the bank, which contention was erroneously accepted by the trial Court and therefore, the Division Bench of

Karnataka High Court held that for adjudication of such claim, the bar under Section 34 of the Act shall not come in the way, While doing so and allowing the appeals, the Division Bench, however, dissolved the status quo order passed in the suits against the bank in view of exercised bar Under Section 34 of the Act and held that the bank is at liberty to proceed for the recovery of its amount by taking necessary steps in respect of the mortgaged properties by the debtors under the provisions of the Act vide Para 8 of the judgment.

JOINT FAMILY PROPERTIES MORTGAGED TO THE BANK TOWARDS THE LOAN

Krishna And Anr. vs Kedarnath And Ors. AIR 2006 Kant 21, ILR 2005 KAR 5338, 2005 (6) KarLJ 337,

Whether all the suits schedule properties are joint family properties and all the properties are mortgaged to the Bank and plaintiffs are entitled to partition etc. after the first charge upon the same is cleared, are all aspects required to be decided by the Civil Court as the plaintiffs rights are traceable to the provision of Section 9 of CPC. Section 34 of the Act is a bar for the Civil Court to entertain the suits in respect of the matters which are empowered to be determined by the Debts Recovery Tribunal or Appellate Tribunal. But, adjudication or determination of rights or claims of the parties for partition of the properties which are in

the nature of civil rights, cannot be stopped. Partition suits that would be instituted by a party claiming civil rights in respect of either ancestral joint family properties or co-ownership properties will have to be exclusively dealt with by the Civil Court. While the Bank can enforce its security interest for realisation of its amount, right of the plaintiffs to claim partition in the suit schedule properties if they prove are ancestral joint family properties cannot be deprived off as contended by the Bank. For adjudication of such claims, the Bar under Section 34 of the Act shall not come in the way.

Bhuru Mal v. Jagannath, AIR 1942 PC 13 the Judicial Committee of the Privy Council Though a business, if it belongs to a Hindu joint family, is an item of joint family property, special considerations apply to the question whether or not a business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by the Hindu law.

DUTY OF THE CREDITOR TO ASCERTAIN WHETHER THE PERSON MAKING THE ACKNOWLEDGEMENT STILL HOLDS HIS REPRESENTATIVE CAPACITY AS KARTA

Nanchand Gangaram Shetji vs Mallappa Mahalingappa Sadalge 1976 AIR 835, 1976 SCR

(3) 287 It is the duty of the creditor to ascertain whether the person making the acknowledgement still holds his representative capacity as karta of the family. The law does not cast any duty upon the members of the family to inform the creditors by a general notice about the disruption of the family. If the creditor fails to make an enquiry and satisfy himself about the capacity of the executant to represent the family at the time of making the acknowledgement, he does so at his own peril. Disruption of the joint family status puts an end to the representative capacity of the karta and any acknowledgement of a debt made by him after such disruption cannot save the creditor's claim from becoming time barred against the other members.

ANY ACKNOWLEDGEMENT MADE BY THE ERSTWHILE KARTA OF SUCH FAMILY CANNOT KEEP THE DEBT ALIVE AND EXTEND LIMITATION AS AGAINST ALL THE MEMBERS

Nanchand Gangaram Shetji vs Mallappa Mahalingappa Sadalge 1976 AIR 835, 1976 SCR (3) 287 The words "manager of a family for the time being" occurring in s. 21(3)(b) of the Limitation Act, 1908. indicate that at the time when the acknowledgement was made and signed, the person making and signing it, must be the manager of a

subsisting joint Hindu family. If at the relevant time the joint Hindu family, as such, was no longer in existence, any acknowledgement made by the erstwhile karta of such family cannot keep the debt alive and extend limitation as against all the members of the family, his representative capacity as karta being co-terminus with the joint status of the family. Disruption of the joint family status, as already noticed, puts an end to the representative capacity of the karta and any acknowledgement of a debt made by him after such disruption cannot save the creditors' claim from becoming time barred against the other members.

KARTA CAN ALIENATE FOR ANTECEDENT DEBTS

Sushil Kumar & Anr vs Ram Prakash & Ors 1988 AIR 576, 1988 SCR (2) 623

Karta of the joint Hindu family had undoubtedly the power to alienate the joint family property for legal necessity or for the benefit of the estate as well as for meeting antecedent debts.....It is well-settled that in a Joint-Hindu Mitakshara family, a son acquires by birth an interest equal to that of the father in the ancestral property. The father by reason of his paternal relation and his position as the head of the family is its manager and he is entitled to alienate the joint family property so as to bind the interests of both the adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit

of the estate or for meeting an E- antecedent debt. A father-Karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt not tainted with immorality.

ALIENATION MADE BY THE FATHER FOR DISCHARGING ANTECEDENT DEBTS WOULD BE BINDING ON THE SONS

In *Fakirappa v. Venkatesh*, 1976(2) Kar. LJ. 186 the validity of a sale by father for legal necessity was under challenge. A learned Single Judge of this Court dealing with the said issue, held: "An alienation made by the father for discharging antecedent debts would be binding on the sons irrespective of the fact that there was no other legal necessity or family necessity supporting it".

PRINCIPLES OF THE HINDU LAW AFTER 2005 AMENDMENT

THE HON'BLE JUSTICE MRS. ROSHAN DALVI, of Bombay High Court in the case of *Shalini Sumant Raut & Ors vs Milind Sumant Raut & Ors* Decided on 14 December, 2012 Quoted following

Alienation can be made for the benefit of the estate, for legal necessity or for meeting any antecedent debts, for management of the joint property by the Karta or pious obligation of a son to discharge his father's debts subject to Section 6(4) of the has as amended in 2005 which runs thus. (4). After the

commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect-

- (a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or
- (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

WHERE SALE FOR DEBT HELD AS SHAM TRANSACTION

In Sadasivam v. K. Doraisamy (AIR 1996 SC 1724)

it was found that when the father has executed sale deed in favour of a near relative and the intention to repay debt or legal necessity has not been proved as a sham transaction.

Hon'ble Bombay High Court in the case of **Shankarlal Gunalal Handelwal v. (MANU/MH/0701/1998 : AIR 1999 Bombay 260)** has held as below:- "It is true that the question as to whether the transaction recorded in the document was never intended to be acted upon by the parties and that the document was sham and bogus arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document was entered into between the parties. Similar view has been taken by Apex Court in the aforesaid decision. In the present case, it is specifically pleaded by the plaintiff that the transaction evidenced by the sale deed in question was nominal and it was executed by him in favour of the defendant by way of security for the amount of Rs. 10,000/- secured by him that on refund of the said amount with interest at the rate of 6% per annum, the defendant was to reconvey the suit plot to him. According to her, the said document was sham and it was not to be acted upon by the parties. As such, in my opinion, in the light of the observations made by the Apex Court in the aforesaid case, the plaintiff was entitled to lead oral evidence in support of his aforesaid averments and, therefore, the evidence led by the plaintiff in this behalf cannot be said to be

inadmissible in view of provisions of Sections 91 and 92 of the Indian Evidence Act."

B. Hasansab vs. Kandaswamy : MANU/KA/3058 /2016 - Admittedly, the plaintiff in the suit is a resident of Earod. He is in Koppal district for the business of running a lorry mechanic shop which he is having in Gangavathi. It is clearly admitted by him that he is running a garage in Gangavathi and he has about 7 acres of agricultural land, out of that, only 2 acres is standing in his name and other lands, he is not aware where they are situated and what is the survey number of the said land is also not known to him. It is stated by him that he wanted to acquire the suit schedule land from the plaintiff for sale consideration of Rs. 3,50,000/- to carry out the agricultural activity. Admittedly the suit land which is an agricultural land, is situated next to 17th Distributor Channel of T.B. Dam which gives a clear indication that, it is an irrigated land with perennial source of water and the location of the property as could be seen from the schedule also indicate that it is situated in a place where it is surrounded by non agricultural land, therefore to presume that this land is valued at Rs. 3,50,000/- at the relevant point of time is difficult to accept.

It is also necessary to observe that admittedly the sale price agreed between the parties is Rs. 3,50,000/-, out of that, Rs. 3,25,000/- is paid on the date when parties have entered into agreement of sale

which clearly indicate that what is required to be paid is only Rs. 25,000/- and that Rs. 25,000/- is kept due for the purpose of securing a survey sketch which would not take more than 10-15 days after the same is applied. In the instant case it is clearly seen that no such survey sketch was applied by both the parties. It is not done by both of them and the agreement does not specify the time limitation within which the sale deed should be completed.

Assuming for a moment that sale is a genuine transaction for sale of the property then the purchaser who has paid Rs. 3,25,000/- out of Rs. 3,50,000/- towards sale consideration would not have allowed this agreement to be an open ended and he would have insisted that it should be on time bound term which would not be more than a month or two or in the alternative he would have insisted for delivery of possession after having paid little more than 90% of the sale consideration. In the instant case delivery of possession of vacant possession pursuant to Sec. 54 of Transfer of Property Act has not taken place.

In addition to that, in the evidence plaintiff clearly admits that the defendant was not keeping good health at the time of sale transaction and he has agreed to sell the suit property to raise money for his treatment, which is the defence of the defendant landlord also. But the only difference is plaintiff is trying to establish that this is a clear sale for valuable consideration. On the other hand, defendant is trying to establish that this transaction is not a sale

transaction and agreement of sale is only to ensure that repayment of loan amount is secured with a charge on his property. On going through the entire pleadings and evidence, it is clearly seen that there appears to be truth in the defence raised by the defendant.

.... In this background if the defence of the defendant is looked into, his defence that after legal notice received by him he went and approached the plaintiff, who assured him the notice is only for extension of the security by way of renewing the agreement the notice is issued, also cannot be disbelieved.

In that view of the matter, it is seen that the trial Court though did not frame an issue regarding Sec. 20(c) of the Specific Relief Act, did keep in its mind that the defendant, an agriculturist having only two acres of land for sustenance of himself and his large family consisting of six persons would be reduced to penury if the decree for specific performance is ordered and hence felt that the lesser relief of granting refund of the earnest money deposit with interest at 24% p.a. is ordered, to ensure fairness to the transaction appears to be just and proper and accordingly the same is considered.

.....In addition to that, it is clearly seen that there is an admission on the part of the plaintiff himself that as at the time when agreement of sale was entered into the defendant was not keeping good health and he was in need of money for his treatment.

When a person is driven to the stage where he has to agree to the tune of his lender as he cannot insist that he will be executing only a promissory note against the loan which will be given and not an agreement of sale.

In addition to that, in the instant transaction if it is seen that as against the agreed sale consideration of Rs. 3,50,000/- more than 90%, i.e., Rs. 3,25,000/- is already paid, what is required to be paid is only Rs. 25,000/-. If it is a genuine sale transaction it would be normal for the purchaser to insist for delivery of possession when he has paid more than 90% of the sale consideration. In the instant case, possession is not yielded to him by the defendant. In addition to that it is made clear that no specific time frame is fixed for completion of the sale transaction in the near future of 2-3 months, it is an open ended agreement, thereby indicating possibility of this being a transaction of loan and not that of a transaction with an intention to sell the suit schedule property.....

.... it is not the defence of the owner-defendant in the original suit that he is declining to honour the agreement of sale in view of the increase in the value, his only defence is that this is the only piece of land which is available to him, which he wanted to utilize for raising the loan for the purpose of securing money for his treatment as well as to clear other loans which are raised for agricultural activity. ...

.... when the entire evidence and pleadings is reassessed, it clearly establish that the sale

transaction is in the nature of loan transaction and execution of agreement of sale is only by way of creating a security for the refund of the loan.

KARTA RIGHTS TO CARRY ON BUSINESS AND PLEDGE JOINT FAMILY PROPERTY

Firm Of Bhagat Ram Mohanlal vs The Commissioner 1956 AIR 374, 1956 SCR 143 It is well settled that when the karta of a joint Hindu family enters into a partnership with strangers, the members of the family do not ipso facto become partners in that firm. They have no right to take part in its management or to sue for its dissolution. The creditors of the firm would no doubt be entitled to proceed against the joint family assets including the shares of the non-partner coparceners for realisation of their debts. But that is because under the Hindu Law, the karta has the right when properly carrying on business to pledge the credit of the joint family to the extent of its assets, and not because the junior members become partners in the business.

CLAIMS OF ADVERSE POSSESSION AMONG JOINT OWNERS

In Annasaheb Bapusaheb Patil v. Balwant, AIR 1995 SC 895; the Hon'ble Supreme Court observed that a claim of adverse possession, being a hostile

assertion involve expressly or impliedly, in denial of the title of the true owner, the burden is always on the person who asserts such a claim to prove by clear and unequivocal evidence that his possession was hostile to the real owner and in deciding such' claim, the Courts must have regard to the animus of the person doing those acts.

In State of Rajasthan v. Harphool Singh, 2000 (5) SCC 652, the Hon'ble Supreme Court observed as under: "More concrete details of the nature of occupation with proper proof thereof would be absolutely necessary and mere vague assertions cannot be themselves, be a substitute for such concrete proof required of open and hostile possession....Such lackadaisical finding based upon mere surmises and conjectures, if allowed....the inevitable casualty is justice and approval of such rank injustice would only result in gross miscarriage of justice."

In P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314; the Hon'ble Supreme Court considered the issue of adverse possession over the family's property and held that it has to be proved by cogent reasons that there has been hostile relations between the parties and the members, who are being denied their right, had insisted to have their share and it had been refused persistently by the members of the family claiming adverse possession. While deciding

the said case, the Hon'ble Supreme Court placed reliance upon the judgment in *Secretary of State for India v. Debendra Lal Khan* (AIR 1934 SC 23), wherein it had been observed that the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. But it is well settled that in order to establish adverse possession of one co-heir as against another, it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties, it is presumed to be on the basis of joint title. The Court further observed as under: - "The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title.It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. This does not necessarily mean that there must be an express demand by one and denial by the other. There are cases which have held that adverse possession and ouster can be inferred when one co-heir takes and

maintains notorious exclusive possession in assertion of hostile title and continues in such possession for a very considerable time and the excluded heir takes no steps to vindicate his title. Whether that line of cases is right or wrong, we need not pause to consider. It is sufficient to notice that the Privy Council in *N. Varada Pillai v. Jeevarathnammal* AIR 1919 PC 44....quotes, apparently with approval, a passage from *Culley v. Deod Taylerson* (1840) 3 P & H 539 : 52 RR 566 (E) which indicates that such a situation may well lead to an inference of ouster 'if other circumstances concur.'.....It may be further mentioned that it is well-settled that the burden of making out ouster is on the person claiming to displace the lawful title of a co-heir by his adverse possession."

In Karbalai Begum v. Mohammed Sayeed and Anr., AIR 1981 SC 77; the Hon'ble Apex Court observed that mere non-participation in the rent and profits of the property by a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. In such a fact-situation, the possession of the party is always in the nature of constructive trustees and would be deemed in law to be the possession of co- sharer ousted.

In Kshitish Chandra Bose v. Commissioner of Ranchi, AIR 1981 SC 707; the Hon'ble Apex Court held that in case of adverse possession, all that the law requires is that the possession must be open and

without any attempt at concealment. It is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner. Such a requirement may be insisted on where an ouster of title is pleaded.

In M. Arthur Paul Ratna Raju and Ors. v. Gudese Garaline Augusta Bhushanbai and Anr., (1998) 7 SCC 103; the Hon'ble Supreme Court held as under:-
 "In the case of co-sharer, mere exercise of possession as of right cannot make out a case of ouster of co-sharer and consequential exercise of adverse possession by the other co-sharer so that ultimately the title of the ouster co-sharer is extinguished on account of adverse possession for the prescribed period."

Apex Court in Bharat Singh and others v. Mst. Bhagirathi reported in MANU/SC/0362/1965 : AIR 1966 SC 405 at para 7 has held as under: "There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the joint family to prove it. The mere fact that after the death of the father mutation entry was made in favour of three brothers and indicated the share of each to be one-third, by itself could be no evidence of the severance of the joint family which, after the death of the father consisted of the three brothers who were minors. Mutation entry in favour of the widow of one of the three brother on his death

might have been made without the knowledge of the other two brothers w.p. were minors at the time. Their minority will also explain the absence of objection to the mutation being made in her favour."

Shambu Prasad Singh v. Most. Phool Kumari and others reported in MANU/SC/0483/1971 : AIR 1971 S.C.1337 it is held at para 17 as under: "On the question of adverse possession by a co-sharer, the law is fairly well settled. Adverse possession has to have the characteristics of adequacy, continuity and exclusiveness. The onus to establish these characteristics is on the adverse possessor. As between co-sharers, the possession of one co-sharer is in law the possession of all co-sharers. Therefore, to constitute adverse possession, ouster of the non-possessing co-sharer has to be made out. As between them, therefore, there must be evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other."

In Karbalai Begum v. Mohd. Sayeed and another reported in MANU/SC/0363/1980 : AIR 1981 S.C. 77 at para. 7 following proposition is laid down: "It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact is admitted, then the legal position would be

that the co-sharers in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees.The possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff."

In Darshan Singh and others v. Gujjar Singh (dead) by LRs. and others reported in MANU/SC/0007 /2002 : (2002)2 SCC 62 at para 9 it is held as under: "In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

The Apex Court in Binapani Paul v. Pratima Ghosh and others reported in MANU/SC/2428/2007 : (2007) 6 S.C.C 100 at para. 39 has held as under: "Interestingly, Amal pleaded ouster. If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster

is not established, a fortiori the title of other co-sharers must be held to have been accepted."

In T. Anjanappa v. Somalingappa reported in MANU/SC/8429/2006 : 2006(7) SCC 570 at para. 12 it is held as under: "12. The concept of adverse possession contemplates a hostile possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property."

Apex Court in Jai Singh and others v. Gurmej Singh reported in MANU/SC/0054/2009 : 2009 AIR SCW 3652 after referring to several earlier judgments, has laid down the following principles at para. 7 which reads as under:

"The principles relating to the inter se rights and liabilities of co-sharers are as follows:

1. A co-owner has an interest in the whole property and also in every parcel of it.
2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.
3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.
4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.
5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.
6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.
7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition."

Vidya Devi @ Vidya Vati (Dead) by L.Rs. v. Prem Prakash and Others reported in MANU/SC/0345 /1995 : (1995) 4 SCC 496 the **minority view** is expressed in the following words:

"28. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law."

The **majority view** as expressed in Para 16 of the said judgment reads as under:

"16. When we now consider the plea of acquisition of title by adverse possession to the holding of co-bhumidhars raised by defendant-1 (respondent-1 herein), a co-bhumidhar in a suit for partition of that holding by another co-bhumidhar, it becomes wholly and clearly untenable because of the entries in Columns 4 and 5 relating to suit for partition of co-bhumidhar in respect of his holding envisaged at Sl. No. 11 to Schedule-1 fixing no period of limitation for

such suit against other co-bhumidhar/s. Thus, when no period of limitation is fixed for filing a suit for partition by co- bhumidhar against his other co-bhumidhars in respect of a joint holding, the question of the other co-bhumidhar acquiring his title to such holding by adverse possession for over 12 years can never arise. If that be so, such plea of perfection of title by adverse possession of a holding by co-bhumidhar against his other co-bhumidhar as defence in the latter's suit for partition can be of no legal consequence. In the said view of the matter, we agree with the learned single Judge of the High Court who held that the explanation to sub-section (1) of section 186 of the DL Act came in the way of defendant-1 (respondent-1 herein) in raising the issue of his title to the holding said to have been acquired by adverse possession and getting it referred by the Revenue Court to Civil Court for decision and disagree with the Division Bench of the High Court which has held that section 67(d) of the DL Act which provides for extinction of bhumidhar's interest in a holding enabled defendant-1 (respondent-1 herein) to take the plea of title by adverse possession in respect of the holding in a suit for partition of such holding filed by a co-bhumidhar".

Apex Court in Des Raj and Ors. v. Bhagat Ram (dead) by L.RS. AND ORS. reported in MANU/SC/7153 /2007 : (2007) 9 SCC 641 wherein at Paragraph 10 it was held as under: "10. We have

noticed hereinbefore the factual aspects of the matter which are neither denied nor disputed. Admittedly, the plaintiff respondent had remained in possession for a long time i.e. since 1953. It may be true that in his plaint, the plaintiff did not specifically plead ouster but muffusil pleadings, as is well known, must be construed liberally. Pleadings must be construed as a whole."

Janatha Dal Party v. The Indian National Congress, New Delhi and Others reported in MANU/KA/2676 /2013 : 2014 (1) KCCR 95. It was held as under:--

"The plea of adverse possession raises a mixed question of law and fact. Where a person wants to base his title on it, he should specifically set up the plea. Unless the plea is raised, it cannot be entertained. A plea must be raised and it must be shown when possession became adverse, so that the starting point of limitation against the party affected can be found. The prayer clause is not a substitute for a plea. A person acquires title by way of adverse possession when he is in continuous, uninterrupted, hostile possession over a period of 12 years. In order to calculate 12 years period there should be a starting point. The date of commencement of adverse possession is very crucial for calculating the period of 12 years. Therefore, the law mandates that the person who seeks a declaration that he has perfected his title by way of adverse possession should specifically plead

the date from which his possession becomes adverse to that of the opposite party against whom the said plea is set up. It is from that date if the party proves continuous, uninterrupted possession for a period of 12 years, then the right of the opposite party to the property stands extinguished and the party who has set up the plea would acquire title by way of adverse possession. Therefore, in the absence of crucial pleadings, which constitute adverse possession, the party cannot claim that he has perfected their title by adverse possession. In a proper case, the Court may have to construe the entire pleadings so as to come to a conclusion as to whether the proper plea of adverse possession has been raised in the pleadings or not which can also be gathered from the cumulative effect of the averments made therein. Therefore, a person who claims adverse possession should show:

- (a) on what date he came into possession,
- (b) what was the nature of his possession,
- (c) whether the factum of possession was known to the other party,
- (d) how long his possession has continued, and
- (e) his possession was open, continuous and undisturbed.

A person pleading adverse possession has no equities in his favour. Because, adverse possession is commenced in wrong and is aimed against right. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts

necessary to establish his adverse possession. Once a suit for recovery of possession is instituted against a defendant in adverse possession his adverse possession does not continue thereafter. In other words, the running of time for acquiring title by adverse possession gets arrested."

Nanjamma vs. Akkayamma and Ors. 2015 (2) KCCR 1437 : MANU/KA/3634/2014 : 2015 (3) Kar LJ 357

- "60. It is well settled that in order to establish adverse possession of one-co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession, merely by any secret hostile animus of his own part in derogation of the other co-heir title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

61. If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective

of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster is not established, a fortiori the title of other co-sharers must be held to have been accepted. 'Ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession.

62. The co-sharer in possession would become constructive trustees on behalf of the co-sharer who is not in possession and the right of such co-sharer would be deemed to be protected by the trustees. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all. Mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.

63. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint family property. It is only when he is ousted from the joint family property and after such ouster, he is out of possession of the property for a period of more than 12 years and in the meanwhile, the person who ousted, asserts his title, continues in possession for

the statutory period openly, then person out of possession loses his right to have possession. When possession of one co-owner in the eye of law is the possession of all the co-owners, till the partition is effected, by metes and bounds, anybody can claim exclusive title of the property because each co-owner has the interest in every parcel of the property.

64. Merely because one co-owner is in exclusive possession of the properties and other co-owners are residing separately it cannot be said that the co-owners who are not in possession are ousted from the property. In the absence of ouster, hostile title, mere exclusive possession would not constitute either adverse possession or ouster. Even in case of alienation, though the alienee is put in exclusive possession of portion of the property, as the property is not divided by metes and bounds, he cannot claim exclusive title in the property for the co-owner who is not a party to the alienation is deemed to be in possession of the property.

65. In the instant case, though the plaintiffs marriage took place in 1958, the right to seek partition accrued in her favour only on the death of her father Bachappa in 1972. Since the time of marriage, the plaintiff was living with her husband and therefore, no portion of her father's property was in the physical possession of the plaintiff. It is only on the date of death of Bachappa all the legal heirs of Bachappa became co-owners; possession of one co-owner is the possession of all the co-owners. Ex. D6, the registered power of

attorney is not cancelled till today. But Kalappa as observed earlier did not choose to act as the power of attorney holder of the executants of Ex. D6. Nor did Kalappa execute joint development agreement or sale deed for and on behalf of the plaintiff. Ex. D7 speaks about the cordial relationship that existed between the sons and daughters of Bachappa. Therefore it can be concluded that the hostile animus to exclude the plaintiff from the suit properties was lacking.

66. There was a partition between Kalappa and Narayanappa pursuant to which the properties were mutated, taxes were paid. These entries were not challenged by the plaintiff and her sisters. It is settled law that a mutation entry or katha change does not extinguish the title of the owner of the property. It may be beneficial to refer to Ex. D6 here as the plaintiff, her sisters had authorized Kalappa to do all acts on their behalf in respect of the properties. Under these circumstances mere change in the RTC entries or changing the khata or payment of tax by the defendants will not amount to asserting hostile title.

67. It is settled principle of law that moffusil pleadings must be liberally construed and pleadings must be construed as a whole. In the instant case absolutely there is no plea of adverse possession or ouster in the written statements. No doubt applications are filed for conversion of the land for non-agricultural purposes, lay-outs have been formed and approval has been obtained for the same. Even these acts cannot constitute a hostile act or assertion of a hostile title

against the co-owners. At best it may amount to development of the properties by those in charge of the same and managing their properties.

76. In the case of a property belonging to coparcenary, joint family or co-ownership, possession of one coparcener or a member of the joint family or a co-owner is the possession of all. To hold that the plaintiff is in joint possession on the date of the suit, it is not necessary that the plaintiff should be in actual physical possession of the whole or part of the property which is the subject matter of the suit. Even the plaintiff need not be getting a share in the income from the property. So long as the plaintiff has a right to a share, the law presumes that he is in joint possession."

RIGHTS OF WOMEN IN IN-LAW'S HOUSE

Supreme Court in S.R. Batra and Anr. v. Taruna Batra, MANU/SC/0007/2007 : (2007) 3 SCC 169

had considered the issue of 'shared household' and laid down various principles to determine whether there was a 'shared household' and what the rights of the daughter-in-law were. The question as to whether the daughter-in-law would be entitled as a matter of right to live in the home of her in-laws has, thereafter, been dealt in several judgments of this Court. Subsequent to Taruna Batra (supra), there have been decisions where some Courts have held that irrespective of whether the property belongs to the in-

laws or not, so long as the daughter-in-law was living in the said home and no alternate accommodation had been made available to her by her husband, she could continue to live and any attempt to evict her would constitute domestic violence. On the other hand, there have been decisions where it has been held that if the house of the in-laws belongs exclusively to them, the same would not constitute a 'shared household' Under Section 2(s) of the DV Act. The only right of the woman in such cases would be to seek maintenance from the husband or children.

In Vimalben Ajitbhai Patel and Ors. v. Vatslabeen Ashokbhai Patel and Ors. MANU/SC/7334/2008 : AIR 2008 SC 2675, the Supreme Court considered a petition filed by the in-laws where it noticed that both the in-laws were very old and the daughter in law was permitted to pursue her remedies against her husband. The Court held as under: "24. The Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained but also there under acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share.

Supreme Court in Hiral P. Harsora and Ors. v. Kusum Narottamdas Harsora and Ors., MANU/SC/1269/2016 : (2017) CRI. L.J. 509 - Court analyzed the purpose of the DV Act including

the Statement of Objects and Reasons. The Supreme Court struck down Section 2 (q) of the DV Act in view of the definition of 'shared household' in Section 2 (s) and held that Section 2 (q) was restrictive in nature. The Supreme Court considered the scheme of the DV Act and in respect of 'shared household' observed as under: "18. It will be noticed that the definition of "domestic relationship" contained in Section 2(f) is a very wide one. It is a relationship between persons who live or have lived together in a shared household and are related in any one of four ways-blood, marriage or a relationship in the nature of marriage, adoption, or family members of a joint family. A reading of these definitions makes it clear that domestic relationships involve persons belonging to both sexes and includes persons related by blood or marriage. This necessarily brings within such domestic relationships male as well as female in-laws, quite apart from male and female members of a family related by blood. Equally, a shared household includes a household which belongs to a joint family of which the Respondent is a member. As has been rightly pointed out by Ms. Arora, even before the 2005 Act was brought into force on 26.10.2006, the Hindu Succession Act, 1956 was amended, by which Section 6 was amended, with effect from 9.9.2005, to make females coparceners of a joint Hindu family and so have a right by birth in the property of such joint family. This being the case, when a member of a joint Hindu family will now include a female coparcener as

well, the restricted definition contained in Section 2(q) has necessarily to be given a relook, given that the definition of 'shared household' in Section 2(s) of the Act would include a household which may belong to a joint family of which the Respondent is a member. The aggrieved person can therefore make, after 2006, her sister, for example, a Respondent, if the Hindu Succession Act amendment is to be looked at. But such is not the case Under Section 2(q) of the 2005 Act, as the main part of Section 2(q) continues to read "adult male person ", while Section 2(s) would include such female coparcener as a Respondent, being a member of a joint family. This is one glaring anomaly which we have to address in the course of our judgment."

In Neetu Mittal v. Kanta Mittal and Ors., MANU/DE/1415/2008 : 2008 (106) DRJ 623, a Ld. Single Judge held that the parents/in-laws have a right to turn the son and daughter-in-law out of the house if the property belongs to them. Only if it is an ancestral house, the son can enforce partition. The right of the woman to seek maintenance is only against the husband or her children but she cannot thrust herself against the parents of the husband.

In Sardar Malkiat Singh v. Kanwaljit Kaur and Ors., MANU/DE/0714/2010 : 2010 (116) DRJ 295, the Ld. Single Judge held that the father-in-law has no obligation to maintain his daughter-in-law. In this

judgment, the Id. Single Judge, following Taruna Batra (supra), observed in paragraph 17 as under: "..... The Appellant is the sole and absolute owner of the suit property and at best the possession of the Respondent No. 1 during the subsistence of her marriage with the Appellant's son could be said to be permissive in nature. This by itself cannot entitle the Respondent No. 1 to claim a right of residence against her father-in-law, who has no legal obligation to maintain his daughter-in-law during the lifetime of her husband, more so when the Respondent No. 1 has parted the company with her husband and is admittedly residing in Chandigarh since the year 1992."

In Shumita Didi Sandhu v. Sanjay Singh Sandhu and Ors. MANU/DE/2773/2010 : (2010) 174 DLT 79 (DB), the Id. Division Bench was considering a judgment of the Single Judge which had followed Taruna Batra (supra) and held that the in-laws home cannot be a 'shared household' or the 'matrimonial home' and hence the daughter in law has no legal right to stay in the house belonging to her parents in law. The Id. Division then approved the view of the Single Judge and followed Taruna Batra (supra). It concluded that the right of residence of the wife does not mean the right to reside in a particular property but would mean the right to reside in a commensurate property. The right of residence is not the same thing as a right to reside in a particular property which the

Appellant refers to as her 'matrimonial home'. The Single Judge's judgment was upheld and it was observed that the learned single Judge had amply protected the Plaintiff by directing that she would not be evicted from the premises in question without following the due process of law.

In Smt. Preeti Satija v. Smt. Raj Kumari and Anr., MANU/DE/0167/2014, however, another ld. Division Bench of the Delhi High Court held that even a tenanted property of the in-laws where the husband has no share, right, interest or title would constitute 'shared household'. The ld. Division Bench held that the right of residence would exist irrespective of whether the house is owned by the in-laws or is merely tenanted. Even if they are tenants, the Court observed that the DV Act is a secular legislation.

Navneet Arora v. Surender Kaur and Ors., MANU/DE/2132/2014, the ld. Division Bench considered Taruna Batra (supra) and Preeti Satija (supra) and recognized the daughter-in-law's right to residence. This judgment distinguished Taruna Batra (supra) by holding that Taruna Batra would be applicable only in a fact situation where she has lived with the husband separately but not as a member of the joint family. It was held that the DV Act gives statutory protection to the right of the wife for a roof. Since the parties were living together with their

parents and were conducting joint business, the property would be 'shared household'.

In Ekta Arora v. Ajay Arora and Anr., MANU/DE/2234/2015 : AIR 2015 Del 180, the mother-in-law was held to be the absolute owner of the property and hence the property could not be a 'shared household'.

In Darshna v. Govt. of NCT of Delhi and Ors., [LPA 537/2018 decided on 03rd October, 2018] and Sunny Paul v. State of NCT of Delhi and Ors. MANU/DE/3649/2018 : 253 (2018) DLT 410, the Id. Division Benches of this Court again considered the provisions of the PSC Act. In both these cases, the rights of the in-laws to seek eviction of the son or daughter-in-law from their own property was upheld on an interpretation of the PSC Act and the Rules of 2017 enacted in Delhi under the said Act. The Id. Division Bench of this Court considered a case arising under the PSC Act wherein the District Magistrate, in proceedings arising under the said Act, had directed the eviction of the daughter-in-law. The writ petition was dismissed and the Id. Division Bench was considering the LPA. In the said judgment, the Id. Division Bench held that in view of the Rule 22(3)(1)(i) of Delhi Maintenance and Welfare of Parents and Senior Citizens (Amendment) Rules, 2017, the son and the daughter-in-law could not claim any right in the property.

In Dattatrey Shivaji Mane v. Lilabai Shivaji Mane and Ors. MANU/MH/1980/2018 : AIR 2018 Bom 229, the Bombay High Court was considering an order passed by the maintenance tribunal under the PSC Act, in a writ petition. The Court observed therein that the petition of the daughter-in-law under the DV Act was dismissed for default. The Court then considered the decision of the Delhi High Court in Sunny Paul (Supra) and held that once the senior citizen is the owner of the property, the possession of the senior citizen cannot be interfered with. Thus, the tribunal's order directing the son and his family to vacate the property was upheld. In this judgment the objects and reasons of the PSC Act were considered in detail by the Court. Thus, the view of the Bombay High Court is that the question of title or proprietary right is of no relevance.

In Hashir v. Shima MANU/KE/0842/2015 : ILR 2015 (2) Kerala 855, the Kerala High Court was considering the provisions of the DV Act and the definition of 'shared household' and followed the judgment of the Supreme Court in Taruna Batra (supra) to hold that a residence belonging to the in-laws would not be a 'shared household'.

Hamina Rang v. District Magistrate (U.T.) and Ors. MANU/PH/0098/2016 : 2016(2) Crimes 517 (P & H), the Punjab and Haryana High Court considered

the DV Act and the PSC Act. In Harmohinder Singh (supra), the Court observed as under: "The provisions of the Act of 2007 and the Act of 2005, referred to above, cannot be used for cross purposes, one annihilating the other. A parent who invokes the provisions of the Act of 2007 cannot create a situation that makes irrelevant the right of a female for securing a protection which is guaranteed under the Act of 2005. The provisions of the protection which is contemplated under Chapter V is an empowering provision for the welfare of a senior citizen that must be read cohesively that the right of a woman to be protected which is guaranteed under the Act of 2005."

In Jayantram Vallabhdas Meswania v. Vallabhdas Govindram Meswania MANU/GJ/1042/2012 : AIR 2013 Guj 160, the tribunal under the PSC Act had directed the son to hand over possession to his father. The Court again considered the provisions of the PSC Act and held that a father who is not earning and has no money to sustain can make an application Under Section 5 of the Act to claim maintenance since the son is in possession of the property of the father and is not taking sufficient care and not providing sufficient maintenance. Thus, the father is entitled to have his own income from the property and the order of eviction from the son was upheld.

Vinay Varma vs. Kanika Pasricha and Ors.: MANU/DE/4076/2019 - The DV Act was enacted in

2005 and has been the subject matter of innumerable decisions. One of the objects of the DV Act is to provide for the rights of women to reside in their 'matrimonial home' or 'shared household' irrespective of whether their husband or the in-laws have a title to the property. The DV Act, thus, protects one of the three basic necessities of human life- viz. shelter, for the woman. Thus, in several proceedings, the right of the daughter-in-law to reside in her 'matrimonial home' or 'shared household' has been recognised.

The PSC Act of 2007 was not the subject matter of the Supreme Court decisions either in Taruna Batra (supra) or in Vimal Ben (supra). The said Act has been enacted to provide maintenance to parents and senior citizens. The purpose of this Act is to ensure that parents and senior citizens are not subjected to harassment by their children in any manner. An obligation has been cast on the children to maintain senior citizens if the said children are in possession of the property of the parent or lay claims to inherit the property of the parents.....

The question, however, is as to how the objectives and provisions of these two Acts are to operate, considering the overlapping nature of the relationships which they seek to govern. Both are special statutes. While, the daughter-in-law's right to residence and a roof over her head is extremely important, the parent's right to enjoy their own property and earn income from the same is also equally important. There can be multitudinal

situations which may arise before Courts wherein a view would have to be taken as to which rights are to be preferred over the other.....

However, later decisions of various High Courts have, while giving divergent opinions on the concept of 'shared household', followed one uniform pattern in order to protect the daughter-in-law and to provide for a dignified roof/shelter for her. The question then arises as to whether the obligation of providing the shelter or roof is upon the in-laws or upon the husband of the daughter-in-law i.e., the son. Some broad guidelines as set out below, can be followed by Courts in order to strike a balance between the PSC Act and the DV Act:

1. The court/tribunal has to first ascertain the nature of the relationship between the parties and the son's/daughter's family.
2. If the case involves eviction of a daughter in law, the court has to also ascertain whether the daughter-in-law was living as part of a joint family.
3. If the relationship is acrimonious, then the parents ought to be permitted to seek eviction of the son/daughter-in-law or daughter/son-in-law from their premises. In such circumstances, the obligation of the husband to maintain the wife would continue in terms of the principles under the DV Act.
4. If the relationship between the parents and the son are peaceful or if the parents are seen colluding with their son, then, an obligation to maintain and to provide for the shelter for the daughter-in-law would

remain both upon the in-laws and the husband especially if they were living as part of a joint family. In such a situation, while parents would be entitled to seek eviction of the daughter-in-law from their property, an alternative reasonable accommodation would have to be provided to her.

5. In case the son or his family is ill-treating the parents then the parents would be entitled to seek unconditional eviction from their property so that they can live a peaceful life and also put the property to use for their generating income and for their own expenses for daily living.

6. If the son has abandoned both the parents and his own wife/children, then if the son's family was living as part of a joint family prior to the breakdown of relationships, the parents would be entitled to seek possession from their daughter-in-law, however, for a reasonable period they would have to provide some shelter to the daughter-in-law during which time she is able to seek her remedies against her husband.

LIABILITY OF CO-PARCENERS

In **MANU/SC/0692/2013 : 2013 4 CTC 539 - Rohit Chauhan v. Surinder Singh & Others**, the Hon'ble Supreme Court held as follows: 11. ...In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor.

Coparcenary is a narrower body than the Joint Hindu Family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener. The view which we have taken finds support from a judgment of this Court in the case of *M. Yogendra v. Leelamma N.*, :MANU/SC/1433/2009 : 2009 (15) SCC 184 : in which it has been held as follows: 29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is

absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the Karta would be valid.

B. Dharaniya and Ors. vs. A. Chandran and Ors.

(2014) 2 MLJ 186 : MANU/TN/2788/2013 - In

MANU/SC/0692/2013 : 2013 4 CTC 539 (Rohit

Chauhan v. Surinder Singh & Others), (cited supra)

the Hon'ble Supreme Court held that so long, on partition an ancestral property remains in the hand of

a single person, it has to be treated as a separate

property and such a person shall be entitled to

dispose of the coparcenary property treating it to be

his separate property but if a son is subsequently

born, the alienation made before the birth cannot be

questioned. Admittedly, the partition was between the

said Nachimuthu Gounder and his two sons on one

side and one Ponnusamy, brother of Nachimuthu

Gounder on the other side in the year 1990. After such

partition the property has to be treated as the

ancestral property in the hands of father and two

sons. They had entered in to a sale agreement in the

year 1995. The father along with his sons had received

the suit amount. Now there is decree against them.

There was no division of property between father and

sons. The properties of Hindu Joint family was divided

between two brothers and sons, particularly, A

schedule was allotted to the said Nachimuthu

Gounder and his two sons as one share and remains to be so. It has to be borne in mind that a share in the coparcenary property enlarges by death and diminishes by birth, the moment any son (now daughter also included) is born, the share diminishes and on the death of one coparcener, viz., the grandfather, as in this case, the share enlarges. As long as the properties are joint is in the hands of the coparceners, the son and daughter of the coparcener gets a right in the property. However the liabilities also to be shared. It is a money decree on the joint family. Sec. 6 of the Hindu Succession (Amendment) Act 2005 would state that the daughter of a coparcener shall,

- (a) by birth become a coparcener in her own right in the same manner as the son;
- (b) have the same rights in the coparcenary property as she would have had if she had been a son;
- (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son

When she acquires the same right of a son, she is also subjected to the same liabilities as that of a son.

In VADLAMANATI VENKATANARAYANA RAO VS. GOTTUMUKKULE VENKATA SOMARAJU MANU/TN/0453/1937 : AIR 1937 Mad 610 a Full Bench of Madras High Court has held as follows: "Where a father is sued as a representative of a joint Hindu family in respect of a joint family liability, the other members of the family must be held to be substantially parties to the suit through him. The fact

that they are not parties/ co nominee, will not render them any the less parties to the suit. A decree obtained against him in such suit will be binding on the joint undivided son and entire joint family property can be taken in execution of such decree even if the son is not a party to the suit. The decree in such case, even if it does not show on its face that it was passed against the coparcenary, would yet be binding upon the whole family in as much as he can effectively represent the entire family in such suit. The decree can be executed against the joint family property in the hands of the son on the death of the father. The son cannot plead in execution that a partition has taken place between him and his father before such decree." In AMRIT SAGAR GUPTA AND OTHERS VS. SUDESH BEHARI LAL AND OTHERS MANU/SC/0484/1969, the Madras Full Bench decision has been relied on and approved. It has been held that, "it is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole family. The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property. It is

not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant that he is being sued as manager. A Karta can represent the family effectively in a proceeding though he is not named as such." "The principle of Hindu Law is that members who are united at the time a joint family liability is incurred, are not absolved from their liability by the fact that they became subsequently divided So far as creditor is concerned, he is entitled to have recourse to every item of the joint family property so long as it is in the hands of the persons who; are under the law liable for his debt. When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division."

Following the abovesaid Full Bench decision, in **T.A. Sankaralingam v. T.N. Mani, MANU/TN/0191/1975 : AIR 1975 Mad 206** , court has further held as follows:- "No doubt, where the other members of a coparcenary are not impleaded as parties to the suit, it would be open to them in execution to impeach the debt on the ground that it is tainted with illegality or immorality but certainly not on the ground that the decree is not binding upon them because they have not been made co nominee parties to the suit. If procurement of a decree against the manager of the joint family has this effect, the objection of T.N. Mani,

that he had been wrongly impleaded as a minor, when, in fact, he was a major, would have no significance in law whatsoever. It is noteworthy, that he was living with his mother. Mariyayee, and Mariyayee was impleaded as the third defendant to the action and was appointed as guardian ad item of T.N. Mani. In these circumstances, despite the misdescription of T.N. Mani as a minor, T.N. Mani must have been aware of this litigation through his mother but he took no steps to rectify the misdescription. Even assuming that he was not aware of the proceedings, the decree would be still binding upon him because it has been granted against the manager of the joint family of which T.N. Mani was an undivided coparcener. In this view, we disagree with the second appellate judge and hold that the decree granted in O.S. No. 888 of 1960. Would be binding upon T.N. Mani and that it is not open to him to contend that because he was a major and he had been misdescribed as a minor, the decree would not be effective against him. We, consequently, reverse the finding of the first appellate court and the second appellate court, allow this appeal and restore the order of the executing court and direct that the execution application filed by the first respondent, T.N. Mani, be dismissed with costs throughout".

KARTA CAPACITY IN JOINT FAMILY

In Kona Adinarayana v. Dronavalli Venkata Subbayya and Anr. MANU/TN/0203/1937 : AIR 1937 Mad 869 the learned Judge of the Madras High Court while dealing with joint family-kartha, contract of sale signed by kartha for himself and separately as representing minor, observed as hereunder: The eldest brother of a joint Hindu family as karta entered into a contract of sale of an item of joint family property wherein he signed it for himself and as representing the minor brother. The second brother also signed the contract by way of concurrence in the sale. In a suit for specific performance of the contract by the brothers, it was contended by the vendees that the contract could not be said to have been entered into on behalf of the family and all the members of the family were not parties as the minor was separately represented by the karta: Held: that karta alone could represent the minor member. In fact, he alone could represent by himself the entire family. Therefore the karta must be deemed to have represented the entire family and the other brother signed only by way of concurrence.

In Raja Sagi Padmanbharaju v. Sagi Lakshmi Kumara Raju and Ors. MANU/AP/0122/1967 : AIR 1967 AP 237 while dealing with Section 53A of the Transfer of Property Act, it was observed that the words by a writing signed by him or on his behalf joint family consisting of father and his minor sons, father as manager of joint family, executing contract of sale

of property, sale ex hypothesi for benefit of family, transferee paying consideration and father putting him in possession of property, transferee, under Section 53A, of the T.P. Act resist claim of son for possession of property because, under Hindu Law, father can be said to have executed contract on behalf of sons also.

In Amrit Sagar Gupta and Ors. v. Sudesh Behari Lal and Ors. MANU/SC/0484/1969 : [1969] 3 SCR 1002 the Apex Court at paras 6 and 7 observed as hereunder. It is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole family. The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property. It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or where he is the defendant that he is being sued as manager. A karta can represent the family effectively in a proceeding though he is not named as such.

K. Adivi Naidu and Ors. v. E. Duruvasulu Naidu and Ors. MANU/SC/0796/1995 : (1995) 6 SCC 150

wherein at para 5 the Apex Court observed at para 5 as hereunder. Having considered the respective contentions, we are of the view that since the preliminary decree was allowed to become final, the trial court needs to give effect to it. It is settled law that alienees of the alienees have no right to equities. Equally, it is settled law that a coparcener has no right to sell his undivided share in the joint family property and any sale of undivided and specified items does not bind the other coparceners. Since the specific properties were purchased prior to the institution of the suit for partition, though the appellants have no right to equities, it could be said that the respective share to which their principal alienor was entitled would be allottable to them as a special case. However, since the preliminary decree specifically directed that the good and bad qualities of the land should be taken into consideration in effecting the partition, it should, in letter and spirit, be given effect to. While passing final decree, if the lands purchased by the appellants are found more valuable than the lands to be allotted to the respondents, the respective values thereof should be ascertained and the respondents need to be compensated in monetary value. That would be the effect of the preliminary decree as well. Considered from this perspective, the direction issued by the Division Bench would be modified as above, and the trial court would pass the final decree accordingly.

Subimal Kumar Maity and Ors. vs. Jhareswar Maity and Ors.: MANU/WB/1050/2019 - Before contracting a sale, a father-karta of a joint family must satisfy the following three conditions: (a) The debt, for which alienation is made must be antecedent in time. (b) The debt must not have been taken for an illegal or immoral purpose. (c) The alienation is necessary for discharging family duties and obligations.

Karta ... had the exclusive authority to manage ancestral joint property on behalf of himself and of the coparceners. It is true that a coparcener takes by birth an interest in the ancestral property, but he is not entitled to separate possession of the coparcenary estate. His rights are not independent of the control of the karta. It would be for the karta to consider the actual pressure on the joint family estate. It would be for him to foresee the danger to be averted and it would be for him to examine as to how best the joint family estate could be beneficially put into use to subserve the interests of the family. A coparcener cannot interfere in these acts of management. Apart from that, a father-karta in addition to the aforesaid powers of alienation has also the special power to sell or mortgage ancestral property to discharge his antecedent debt which is not tainted with immorality. If there is no such need or benefit, the purchaser takes risk and the right and interest of coparcener will remain unimpaired in the alienated property. No doubt the law confers a right on the coparcener to

challenge the alienation made by karta, but that right is not inclusive of the right to obstruct alienation. Nor the right to obstruct alienation could be considered as incidental to the right to challenge the alienation. These are two distinct rights. One is the right to claim a share in the joint family estate free from unnecessary and unwanted encumbrance. The other is a right to interfere with the act of management of the joint family affairs. The coparcener cannot claim the latter right and indeed, he is not entitled for it. Therefore, he cannot move the court to grant relief by injunction restraining the karta from alienating the coparcenary property. The above principle relating to the rights of karta in management of ancestral joint property vis-a-vis the right and interest of the coparcener has been laid down by the Hon'ble Supreme Court in **Sushil Kumar & Anr vs. Ram Prakash & Ors reported in MANU/SC/0521/1988 : AIR 1988 SC 576.**

Hon'ble Supreme Court in the case of **Shreya Vidyarthi Vs. Ashok Vidyarthi and others (MANU/SC/1465/2015 : (2015) 16 Supreme Court cases 46)**, wherein the Head Notes A and B are as under: "..... Powers, Rights and Duties of-Hindu widow is not coparcener in undivided family of her husband-Therefore, she cannot act as Karta of that undivided family, however she can act as its manager-Position of Hindu widows remains unaltered even after amendment to Hindu Succession Act, 1956 in

2005-Manager denotes role distinct from that of Karta-Where male adult died and there is minor coparcener, under such circumstances, joint family does not comes to end-Mother of minor coparcener as legal guardian of minor can act as manager-Words and Phrases-"Karta" and "Manager"-Not synonymous. Properties purchased out of insurance amount received on account of death of common ancestor-Property assumes character of joint family property-Further, after death of common ancestor family continued to be joint-Allotment of share to plaintiff, justified."

LEGAL NECESSITY

In Radhakrishnadas and Anr. v. Kaluram MANU/ SC/ 0393/1962 : [1963] 1 SCR 648 it was held at para 5 as hereunder. Before us Mr. S.P. Sinha accepts the position that Rs. 45,000/- out of the consideration of Rs. 50,000/- was in fact for debts binding on the family, but contends that even so it cannot be said that there was legal necessity for the sale. His argument is that a sum of Rs. 5,000/- or so for which, according to him, legal necessity had not been established was not a negligible part of the consideration of Rs. 50,000/-. This argument is based upon a misapprehension of the true legal position. It is well established by the decisions of the Courts in India and the Privy Council that what the alienee is required to establish is legal necessity for the

transaction and that it is not necessary for him to show that every bit of the consideration, which he advanced, was actually applied for meeting family necessity.

In Smt. Rani and Anr. v. Smt. Santa Bala Debnath and Ors. AIR 1984 SC 846 the Apex Court observed at paras 10 and 11 as hereunder. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjudging whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal necessity does not mean actual compulsion; it means pressure upon the estate, which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of

legal necessity. The weight to be attached to the recitals varies according to the circumstances. Where the evidence which could be brought before the Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the Court may be justified in appropriate cases in raising an inference against the party seeking to set aside the sale on the ground of absence of legal necessity wholly or partially, when he withholds evidence in his possession.

In Gangadharan v. Janardhana Mallan and Ors. MANU/SC/0533/1996 : AIR1996SC2127 the Apex Court while dealing with validity of the alienation made by father observed that the findings by subordinate court as to adequacy of sale consideration, substantial portion having gone into discharge of antecedent debts and enquiries made by purchaser regarding legal necessity and the suit to challenge alienation filed after long lapse is not maintainable.

In Kehar Singh (Dead) Through Legal Representatives and Others Versus Nachittar Kaur and Others, reported in MANU/SC/0874/2018 : (2018) 14 Supreme Court Cases 445, wherein it was held that, "Once the factum of existence of legal necessity stood proved, then, no co-parcener (son) has

a right to challenge the sale made by the Karta of his family. The plaintiff being a son was one of the co-parceners along with his father P. He had no right to challenge such sale in the light of the findings of legal necessity being recorded against him. It was more so when the plaintiff failed to prove by any evidence that there was no legal necessity for sale of the suit land or that the evidence adduced by the defendants to prove the factum of existence of legal necessity was either insufficient or irrelevant or no evidence at all."

In Sakha ram Mahadji Rajegore and others Versus Datta Vithalrao Rajegore and others, reported in MANU/MH/0452/2010: 2010 (6) Mh.L.J. 225, wherein it was held that, "Karta of the family can sell the property for legal necessity." Similar view was taken in Prasad and Others Versus V. Govindaswami Mudaliar and Others And K.P. Ramamurthi and Others Versus V. Govindaswami Mudaliar and Others, reported in MANU/SC/0317/1981 : (1982) 1 Supreme Court 185, Sunder Das and Others Versus Gajananrao and Others, reported in MANU/SC/0388/1997 : (1997) 9 Supreme Court Cases 701, and Shridhar s/o Bajirao Pawar and others Versus Bajirao s/o Dhondiba Pawar and other, reported in MANU/MH/1310/2016 : (2016) 5 AIR Bom R 243.

E. Ramendra Rao Versus Dinesh Chand Verma and Others, reported in MANU/CG/0321/2010 : 2010

(2) CGLJ 281 that, expenses incurred for medical treatment is a necessity for purposes of which a Karta can alienate the joint family properties. It was on the basis of the fact that the defendants have proved that, defendant No. 1's wife was suffering from Tuberculosis (TB) and was hospitalized. Huge expenses have been incurred on her treatment, and therefore, defendant No. 1 had taken step to sell out the land.

Kakumanu Pedasubhayya and Another Versus Kakumanu Akkamma and Another, reported in MANU/SC/0147/1958 : AIR 1958 SC 1042, wherein it has been held that, "A minor has no volition on his own in law and therefore cannot ask for partition of family property."

Nagaiah and another Versus Smt. Chowdamma (dead) By Lrs. And another, reported in MANU/SC/0014/2018, wherein it has been held that, "A minor cannot file a suit through the next friend unless the guardian representing the minor has an interest adverse to the interest of the minor."

A PERSON NOT PARTY TO CONTRACT CANNOT ENFORCE ITS COVENANTS

In the decision reported as MANU/SC/0008/1969 : 1969 (2) SCC 343 M.C. Chacko Vs. The State Bank of Travancore, Trivandrum it was held: "9. Kottayam

Bank not being a party to the deed was not bound by the covenants in the deed, nor could it enforce the covenants. It is settled law that a person not a party to a contract cannot subject to certain well recognised exceptions, cannot enforce the terms of the contract: the recognised exceptions are that beneficiaries under the terms of the contract or where the contract is a part of the family arrangement may enforce the covenant.

SUIT TO SET ASIDE SALE DEED BY MINOR TO BE FILED WITHIN LIMITATION

Vishwambhar and Others Vs. Laxminarayanan (Dead) Through LRS. And Another. MANU/SC /0374/2001 : 2001 6 SCC 163,

"3. The gist of the case pleaded by the plaintiffs was that their mother as guardian executed the above sale deeds without any legal necessity and without sanction of the court. The transfers made by her were void ab initio and not binding on the plaintiffs and they are entitled to ignore the same altogether. In para 4 of the plaint, it was averred "the transaction, therefore, is liable to be treated as of no legal validity, right from its inception and Defendant 1 never got any title to it under the law". Averment to the same effect was made in respect of the sale deed dated 24-10-1974 in favour of Defendant 2 in para 5 of the plaint. The plaintiffs pleaded that the purchasers are trespassers on the suit land; that the plaintiffs have a

right to recover possession of the suit land from the purchasers within 12 years which they have done. Reliance was placed on Article 65 of the Limitation Act. In para 7 of the plaint, it was asserted that the suit has been filed within the period of limitation with reference to the suit transaction for the relief of recovery of possession by way of partition of the suit land. It is relevant to state here that the relief of declaration that the sale deeds executed by Defendant 3 in favour of Defendants 1 and 2 are invalid and inoperative and that the said sale deeds be set aside, were added in the plaint subsequently by amendment."

"4. The contesting Defendants 1 and 2 filed written statements pleading, inter alia, that the Hindu Minority and Guardianship Act is not applicable in the case since the alienation has been made by the mother as natural guardian of the minors. She was also the manager of the joint family property. In such a case, according to the defendants, lack of sanction under Section 8 of the Act is not fatal to the alienations. The defendants further averred that the alienations were made for legal necessity, for maintenance of the plaintiffs, for meeting the marriage expenses of Defendants 4 to 7, for satisfying antecedent debts etc. They also took the plea of limitation since the suit was filed beyond 3 years after the minors attained majority. They prayed for dismissal of the suit with costs. Defendants 3 to 7 supported the case of the plaintiffs."

"9. On a fair reading of the plaint, it is clear that the main fulcrum on which the case of the plaintiffs was balanced was that the alienations made by their mother-guardian Laxmibai were void and therefore, liable to be ignored since they were not supported by legal necessity and without permission of the competent court. On that basis, the claim was made that the alienations did not affect the interest of the plaintiffs in the suit property. The prayers in the plaint were inter alia to set aside the sale deeds dated 14-11-1967 and 24-10-1974, recover possession of the properties sold from the respective purchasers, partition of the properties carving out separate possession of the share from the suit properties of the plaintiffs and deliver the same to them. As noted earlier, the trial court as well as the first appellate court accepted the case of the plaintiffs that the alienations in dispute were not supported by legal necessity. They also held that no prior permission of the court was taken for the said alienations. The question is, in such circumstances, are the alienations void or voidable? In Section 8(2) of the Hindu Minority and Guardianship Act, 1956, it is laid down, inter alia, that the natural guardian shall not, without previous permission of the court, transfer by sale any part of the immoveable property of the minor. In sub-section (3) of the said section, it is specifically provided that any disposal of immoveable property by a natural guardian, in contravention of sub-section (2) is voidable at the instance of the minor or any person

claiming under him. There is, therefore, little scope for doubt that the alienations made by Laxmibai which are under challenge in the suit were voidable at the instance of the plaintiffs and the plaintiffs were required to get the alienations set aside if they wanted to avoid the transfers and regain the properties from the purchasers. As noted earlier in the plaint as it stood before the amendment the prayer for setting aside the sale deeds was not there, such a prayer appears to have been introduced by amendment during hearing of the suit and the trial court considered the amended prayer and decided the suit on that basis. If in law the plaintiffs were required to have the sale deeds set aside before making any claim in respect of the properties sold, then a suit without such a prayer was of no avail to the plaintiffs. In all probability, realising this difficulty the plaintiffs filed the application for amendment of the plaint seeking to introduce the prayer for setting aside the sale deeds. Unfortunately, the realisation came too late. Concededly, Plaintiff 2 Digamber attained majority on 5-8-1975 and Vishwambhar, Plaintiff 1 attained majority on 20-7-1978. Though the suit was filed on 30-11-1980 the prayer seeking setting aside of the sale deeds was made in December 1985. Article 60 of the Limitation Act prescribes a period of three years for setting aside a transfer of property made by the guardian of a ward, by the ward who has attained majority and the period is to be computed from the date when the ward attains majority. Since the

limitation started running from the dates when the plaintiffs attained majority the prescribed period had elapsed by the date of presentation of the plaint so far as Digamber is concerned. Therefore, the trial court rightly dismissed the suit filed by Digamber. The judgment of the trial court dismissing the suit was not challenged by him. Even assuming that as the suit filed by one of the plaintiffs was within time the entire suit could not be dismissed on the ground of limitation, in the absence of challenge against the dismissal of the suit filed by Digamber the first appellate court could not have interfered with that part of the decision of the trial court. Regarding the suit filed by Vishwambhar, it was filed within the prescribed period of limitation but without the prayer for setting aside the sale deeds. Since the claim for recovery of possession of the properties alienated could not have been made without setting aside the sale deeds the suit as initially filed was not maintainable. By the date the defect was rectified (December 1985) by introducing such a prayer by amendment of the plaint the prescribed period of limitation for seeking such a relief had elapsed. In the circumstances, the amendment of the plaint could not come to the rescue of the plaintiff."

It is thus seen that the Honourable Supreme Court had specifically held that the suit should be filed within the period of limitation, namely three years from the age of attaining majority **and there should be a prayer to set aside the sale deed.**

JOINT FAMILY PARTITION AND REUNION EXPLAINED

U. Manjunath Rao vs. U. Chandrashekar and Ors.:

MANU/KA/6562/2019 - The Hon'ble Apex Court in Bhagwan Dayal (since deceased) and thereafter his heirs and legal representatives Bansgopal Dubey and another vs. Mst. Reoti Devi (deceased) and after her death, Mst. Dayavati, her daughter, reported in MANU/SC/0374/1961 : AIR 1962 SC 287, has elaborately discussed on the point of presumption of partition under Hindu joint family and its re-union in Paragraphs, 16, 22 and 47 of its judgment, the extract of which are reproduced here below:

"16: The general principle is that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by course of conduct. It is also settled that there is no presumption that when one member separates from others that the latter remain united; whether the latter remain united or not must be decided on the facts of each case. To these it may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily

by reasonable inferences than in a case where the evidence is not obliterated by passage of time."

"22: if a Hindu family separates, the family or members of it may agree to reunite as a Hindu family, but such a reuniting is obvious reasons, which would apply in cases under the law of the Mitakshara, very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved. The leading authority for that last proposition is *Balabux Ladhuram v. Rukhmabai*, 30 Ind App 130 (PC). It is also well settled that to constitute a reunion there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status of members of a joint Hindu family. Such an agreement need not be express, but may be implied from the conduct of the parties alleged to have reunited. But the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. As the burden is heavy on a party asserting reunion, ambiguous pieces of conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion. ."

"47: .Coparcenary is a creature of Hindu law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or a family unit. The law also recognizes a branch of the family as a subordinate corporate body. The said

family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by consent express or implied of the members of the family, any other member or members can on business or acquire property, subject to the limitations laid down by the said law, for or on behalf of the family. Such business or property would be the business or property of the family. The identity of the members of the family is not completely lost in the family. One or more members of that family can start a business or acquire property without the aid of the joint family property, but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self-acquisition, and succession to such property would be governed not by the law of joint family but only by the law of inheritance. In such a case, if a property was jointly acquired by them, it would not be governed by the law of joint family; for Hindu law does not recognize some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired. The concept

of joint tenancy known to English law with the right of survivorship is unknown to Hindu law except in regard to cases specially recognized by it. In the present case, the uncle and the two nephews did not belong to the same branch. The acquisition made by them jointly could not be impressed with the incidents of joint family property. They can only be co-sharers or co-tenants, with the result that their properties passed by inheritance and not by survivorship."

A Division Bench of Karnataka High Court in the case of M/s. Paramanand L. Bajaj, Bangalore vs. The Commissioner of Income Tax, Karnataka, II, Bangalore, reported in MANU/KA/0059/1981 : ITR 1981 Kar 1219, in Paragraph-12 of its judgment was pleased to observe as below:

"12: The provision for reunion has been provided for, for enabling erstwhile members of a Hindu undivided family, to come together and to form once again a joint family governed by Mitakshara law. The mutual love, affection arising from blood relationship and the desire to reunite proceeding therefrom, constitutes the very foundation of reunion. This is evident from the text of Brihaspati in which even the relationship of persons who could reunite is specified though some of the commentators have taken the view that it is only illustrative and not exhaustive and that reunion is possible even among persons not specified in the text of Brihaspati. (See: Virmitrodaya, translated by Gopalachandra Sarkar (1879) pp 204-205; Vivadachintamani Gaekwad's

Oriental Series Vol. XCIX pp 288-289). But even so there is no controversy that reunion is possible only among persons who were on an earlier date members of a HUF. Reunion therefore is a reversal of the process of partition. Therefore, it is reasonable to take the view that reunion is not merely an agreement to live together as tenants in common, but is intended to bring about a fusion in interest and estate among the divided members of an erstwhile HUF so as to restore to them the status of HUF once again and therefore reunion creates right on all the reuniting coparceners in the joint family properties which were the subject matter of partition among them to the extent they were not dissipated away before the date of reunion." In the very same judgment, ...Court was pleased to observe in Paragraph-16 that, it is well settled that, a partition of a Hindu undivided family can be effected orally and it follows that parties to such oral partition, can reunite also with mutual consent without the requirement of any registered Deed of reunion. If, however, earlier partition was by a registered Deed, the reunion which follows it, to be valid in law, must also be effected by means of a registered Deed.

In the light of the above judgments, it is clear that there is no bar under Hindu Law for reunion of a Hindu family making it a joint family, which joint family was earlier divided. However, such a reunion in Mitakshara appears to be a very rare occurrence and when it happens, it must be strictly proved as any other disputed fact is proved. Most important is that,

to constitute a reunion, there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite the estate with an intention to revert to their former status of a member of a joint Hindu family. Generally, such an agreement need not be express, but, may be implied from the conduct of the parties alleged to have reunited. But, the conduct must be of such an incontrovertible character that an agreement of reunion must be necessarily implied therefrom. Reunion is not merely an agreement to live together as tenants in common, but is intended to bring about a fusion in interest and estate among the divided members of an erstwhile Hindu undivided family so as to restore them the status of Hindu undivided family once again. As the burden is heavy on a party asserting reunion, ambiguous pieces and conduct equally consistent with a reunion or ordinary joint enjoyment cannot sustain a plea of reunion. If the earlier partition was by way of registered Deed, the reunion which follows it, to be valid in law, also to be effected by means of a registered Deed.

PROPERTY OF GOD

In MANU/SC/0393/1999 : 1999 (5) SCC 50, their Lordships of Hon. Apex Court in the case of "Ram Jankijee Deities & others v. State of Bihar & others", have held that Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or

self-existent or self-revealed, while the other is Pratisthita or established. A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply discover its existence and such images do not require consecration or Pratistha but a manmade image requires consecration. This manmade image may be painted on a wall or canvas. God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. It was further held that the deity/idol are the juridical person entitled to hold the property. In paragraph Nos. 14, 16 and 19, their Lordships have held as under:- "14. Images according to Hindu authorities, are of two kinds: the first is known as Sayambhu or self-existent or self-revealed, while the other is Pratisthita or established. The Padma Purana says: "the image of Hari (God) prepared of stone earth, wood, metal or the like and established according to the rites laid down in the Vedas, Smritis and Tantras is called the established images...where the self-posessed Vishnu has placed himself on earth in stone or wood for the benefit of mankind, that is styled the self-revealed." (B.K. Mukherjea-Hindu Law of Religious and Charitable Trusts: 5th Edn.) A Sayambhu or self-revealed image is a product of nature and it is Anadi or without any beginning and the worshippers simply

discover its existence and such images do not require consecration or Pratistha but a manmade image requires consecration. This manmade image may be painted on a wall or canvas. The Salgram Shila depicts Narayana being the Lord of the Lords and represents Vishnu Bhagwan. It is a Shila - the shalagram form partaking the form of Lord of the Lords Narayana and Vishnu.

16. The observations of the Division Bench has been in our view true to the Shastras and we do lend our concurrence to the same. If the people believe in the temples' religious efficacy no other requirement exists as regards other areas and the learned Judge it seems has completely overlooked this aspect of Hindu Shastras - In any event, Hindus have in Shastras "Agni" Devta; "Vayu" Devta - these deities are shapeless and formless but for every ritual Hindus offer their oblations before the deity. The Ahuti to the deity is the ultimate - the learned Single Judge however was pleased not to put any reliance thereon. It is not a particular image which is a juridical person but it is a particular bent of mind which consecrate the image.

19. God is Omnipotent and Omniscient and its presence is felt not by reason of a particular form or image but by reason of the presence of the omnipotent: It is formless, it is shapeless and it is for the benefit of the worshippers that there is manifestation in images of the Supreme Being. 'The Supreme Being has no attribute, which consists of

pure spirit and which is without a second being, i.e. God is the only Being existing in reality, there is no other being in real existence excepting Him - (see in this context Golap Chandra Sarkar, Sastri's Hindu Law: 8th Edn.). It is the human concept of the Lord of the Lords - it is the human vision of the Lord of the Lords: How one sees the deity: how one feels the deity and recognises the deity and then establishes the same in the temple upon however performance of the consecration ceremony. Shastras do provide as to how to consecrate and the usual ceremonies of Sankalpa and Utsarga shall have to be performed for proper and effective dedication of the property to a deity and in order to be termed as a juristic person. In the conception of Debutter, two essential ideas are required to be performed: In the first place, the property which is dedicated to the deity vests in an ideal sense in the deity itself as a juristic person and in the second place, the personality of the idol being linked up with natural personality of the shebait, being the manager or being the Dharam karta and who is entrusted with the custody of the idol and who is responsible otherwise for preservation of the property of the idol. The Deva Pratistha Tatwa of Raghunandan and Matsya and Devi Puranas though may not be uniform in its description as to how Pratistha or consecration of image does take place but it is customary that the image is first carried to the Snan Mandap and thereafter the founder utters the Sankalpa Mantra and upon completion thereof, the

image is given bath with Holy water, Ghee, Dahi, Honey and Rose water and thereafter the oblation to the sacred fire by which the Pran Pratistha takes place and the eternal spirit is infused in that particular idol and the image is then taken to the temple itself and the same is thereafter formally dedicated to the deity. A simple piece of wood or stone may become the image or idol and divinity is attributed to the same. As noticed above, it is formless, shapeless but it is the human concept of a particular divine existence which gives it the shape, the size and the colour. While it is true that the learned Single Judge has quoted some eminent authors but in our view the same does not however, lend any assistance to the matter in issue and the Principles of Hindu Law seems to have been totally misread by the learned Single Judge."

In MANU/SC/0219/2000 : AIR 2000 SC 1421, their Lordships of Hon. Supreme Court in the case of 'Shiromani Gurudwara Prabandhak Committee, Amritsar v. Shri Som Nath Dass & others' have held that the concept 'Juristic Person' arose out of necessities in the human development-Recognition of an entity as juristic person-is for subserving the needs and faith of society. In paragraph Nos. 11, 13 and 14, their Lordships held as under:-

"11. The very words "Juristic Person" connote recognition of an entity to be in law a person which otherwise it is not. In other words, it is not an individual natural person but an artificially created

person which is to be recognised to be in law as such. When a person is ordinarily understood to be a natural person, it only means a human person. Essentially, every human person is a person. If we trace the history of a "Person" in the various countries we find surprisingly it has projected differently at different times. In some countries even human beings were not treated to be as persons in law. Under the Roman Law a "Slave" was not a person. He had no right to a family. He was treated like an animal or chattel. In French Colonies also, before slavery was abolished, the slaves were not treated to be legal persons. They were later given recognition as legal persons only through a statute. Similarly, in the U.S. the African-Americans had no legal rights though they were not treated as chattel.....

13. With the development of society, 'where an individual's interaction fell short, to upsurge social development, co-operation of a larger circle of individuals was necessitated. Thus, institutions like corporations and companies were created, to help the society in achieving the desired result. The very Constitution of State, municipal corporation, company etc. are all creations of the law and these "Juristic Persons" arose out of necessities in the human development. In other words, they were dressed in a cloak to be recognised in law to be a legal unit.

Corpus Juris Secundum, Vol. LXV, page 40 says: Natural person. A natural person is a human

being; a man, woman, or child, as opposed to a corporation, which has a certain personality impressed on it by law and is called an artificial person. In the C.J.S. definition 'Person' it is stated that the word "person," in its primary sense, means natural person, but that the generally accepted meaning of the word as used in law includes natural persons and artificial, conventional, or juristic persons.

Corpus Juris Secundum, Vol. VI, page 778 says: Artificial persons. Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

Salmond on Jurisprudence, 12th Edn., 305 says: A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human being is one of the most noteworthy feats of the legal imagination.... Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases. Those which are actually recognised by our own system, however, are of comparatively few types. Corporations are undoubtedly legal persons, and the better view is that registered trade unions and friendly societies are also legal persons though not verbally regarded as corporations. ... If, however, we take account of other systems than our own, we find that the conception of

legal personality is not so limited in its application, and that there are several distinct varieties, of which three may be selected for special mention...

1. The first class of legal persons consists of corporations, as already defined, namely, those which are constituted by the personification of groups or series of individuals. The individuals who thus form the corpus of the legal person are termed its members....

2. The second class is that in which the corpus, or object selected for personification, is not a group or series of persons, but an institution. The law may, if it pleases, regard a church or a hospital, or a university, or a library, as a person. That is to say, it may attribute personality, not to any group of persons connected with the institution, but to the institution itself....

3. The third kind of legal person is that in which the corpus is some fund or estate devoted to special uses - a charitable fund, for example or a trust estate...

Jurisprudence by Paton, 3rd Edn. page 349 and 350 says: It has already been asserted that legal personality is an artificial creation of the law. Legal persons are all entities capable of being right-and-duty-bearing units-all entities recognised by the law as capable of being parties to legal relationship. Salmond said: 'So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties... ...Legal personality may be

granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol. Twenty men may form a corporation which may sue and be sued in the corporate name. An idol may be regarded as a legal persona in itself, or a particular fund may be incorporated. It is clear that neither the idol nor the fund can carry out the activities incidental to litigation or other activities incidental to the carrying on of legal relationships, e.g., the signing of a contract: and, of necessity, the law recognises certain human agents as representatives of the idol or of the fund. The acts of such agents, however (within limits set by the law and when they are acting as such), are imputed to the legal persona of the idol and are not the juristic acts of the human agents themselves. This is no mere academic distinction, for it is the legal persona of the idol that is bound to the legal relationships created, not that of the agent. Legal personality then refers to the particular device by which the law creates or recognizes units to which it ascribes certain powers and capacities." Analytical and Historical Jurisprudence, 3rd Edn. At page 357 describes "person"; We may, therefore, define a person for the purpose of jurisprudence as any entity (not necessarily a human being) to which rights or duties may be attributed.

14. Thus, it is well settled and confirmed by the authorities on jurisprudence and Courts of various countries that for a bigger thrust of socio-political-scientific development evolution of a fictional

personality to be a juristic person became inevitable. This may be any entity, living inanimate, objects or things. It may be a religious institution or any such useful unit which may impel the Courts to recognise it. This recognition is for subserving the needs and faith of the society. A juristic person, like any other natural person is in law also conferred with rights and obligations and is dealt with in accordance with law. In other words, the entity acts like a natural person but only through a designated person, whose acts are processed within the ambit of law. When an idol, was recognised as a juristic person, it was known it could not act by itself. As in the case of minor a guardian is appointed, so in the case of idol, a Shebait or manager is appointed to act on its behalf. In that sense, relation between an idol and Shebait is akin to that of a minor and a guardian. As a minor cannot express himself, so the idol, but like a guardian, the Shebait and manager have limitations under which they have to act. Similarly, where there is any endowment for charitable purpose it can create institutions like a church hospital, gurudwara etc. The entrustment of an endowed fund for a purpose can only be used by the person so entrusted for that purpose in as much as he receives it for that purpose alone in trust. When the donor endows for an Idol or for a mosque or for any institution, it necessitates the creation of a juristic person. The law also circumscribes the rights of any person receiving such entrustment to use it only for the purpose of such a juristic person. The endowment

may be given for various purposes, may be for a church, idol, gurdwara or such other things that the human faculty may conceive of, out of faith and conscience but it gains the status of juristic person when it is recognised by the society as such."

LIABILITY OF ANIMAL TRANSPORTERS

Hon'ble Supreme Court in MANU/SC/1799/2009 :

2010 (1) SCC 234, in the case of "Bharat Amratlal Kothari & another vs. Dosukhan Samadkhan Sindhi & others", have held that animals filled in trucks in a cruel manner and being transported, seized by police on complainant's report and sent to pinjrapole and the owner of animals claiming custody of animals. In these circumstances, normal cost of maintenance and treatment of animals under Section 35(4) would be payable by the persons claiming custody and not by the complainant. Their Lordships have held as under:-

"40. Moreover, no claim was advanced by Respondent 8 herein that Appellant 1 should be directed to pay, on behalf of the owners i.e. Respondents 1 to 6, the cost of maintenance and treatment of the animals in question in accordance with the provisions of sub-section (4) of Section 35 of the Act. Normally, cost of maintenance and treatment of the animals in such cases would be payable by one who claims custody or who are the owners of the livestock but not by the complainant. In the instant case the assertion made by Appellant 1 is that he was handed over custody of goats and sheep by the police after registration of FIR

whereas the case of Respondents 1 to 6 seems to be that Appellant 1 had taken possession of the livestock and trucks illegally before the FIR was lodged and had acted in a high-handed manner."

Hon'ble Supreme Court in MANU/SC/0426/2014 :

2014 (7) SCC 547, in the case of "Animal Welfare Board of India vs. A. Nagaraja & others", have held that animal welfare laws have to be interpreted keeping in mind the welfare of animals and species best interest subject to just exceptions out of human necessity. Their Lordships have further held that there are internationally recognized freedoms of animals as under:- (i) freedom from hunger, thirst and malnutrition; (ii) freedom from fear and distress; (iii) freedom from physical and thermal discomfort; (iv) freedom from pain, injury and disease; and (v) freedom to express normal patterns of behavior. These five freedoms have to be read into Sections 3 and 11 of PCA Act and have to be protected and safeguarded by the States, Central Government, Union Territories, MoEF and AWBI. Though no international agreement ensures protection of animals' welfare, campaigns like UDAW and WSPA's and OIE's effort in this regard, taken judicial note off. It is the duty to protect welfare of animals and not to put them to avoidable pain and suffering. Their Lordships have also explained the meaning of "pain and suffering". Pain informs an animal which stimuli it needs to avoid and suffering informs it about a situation to avoid. Their Lordships

have held that every species has a right to life and security, subject to the law of the land, which includes depriving its life, out of human necessity. Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animal life, which are necessary for human life, within the meaning of Article 21 of the Constitution. So far as animals are concerned, "life" means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honour and dignity.

ANIMALS ARE NOT PROPERTIES

Karnail Singh and Ors. vs. State of Haryana: MANU/PH/0580/2019 Their Lordships of the Hon'ble Supreme Court in "A. Nagaraja's" case have held that Article 21 of the Constitution, while safeguarding the rights of humans, protects life and the word "life" has been given an expanded definition and any disturbance from the basic environment which includes all forms of life, including animals life, which are necessary for human life, fall within the meaning of Article 21 of the Constitution. "Life" means something more than mere survival or existence or instrumental value for human beings, but to lead a life with some intrinsic worth, honour or dignity. All

the animals have honour and dignity. Every species has an inherent right to live and is required to be protected by law. The rights and privacy of animals are to be respected and protected from unlawful attacks. Their Lordships have evolved the term "species' best interest." The Corporations, Hindu idols, holy scriptures, rivers have been declared legal entities and thus, in order to protect and promote greater welfare of animals including avian and aquatic, animals are required to be conferred with the status of legal entity/legal person. The animals should be healthy, comfortable, well nourished, safe, able to express innate behavior without pain, fear and distress. They are entitled to justice. The animals cannot be treated as objects or property.

MITAKSHARA CO-PARCENARY PROPERTY

Hon'ble Supreme Court in the case of Hardeo Rai vs. Sakuntala Devi & others reported in MANU/SC /7540/2008 : (2008) 7 SCC 46 that "According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Chapter I. 1-27). The incidents of coparcenership under the Mitakshara law are: first, the lineal male descendants

of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter."

FEMALE HINDU RIGHTS ON PROPERTY

Smt. **Akkayamma and Another Vs. The State of Karnataka and others (MANU/KA/0967/2006 : 2006 (4) KCCR 2520)** - In order to attract provisions of Section 14 of the Hindu Succession Act, it must be established that the female Hindu had a right to the possession of the property in question and that she was in possession of such property, either actually or constructively.If the female Hindu is merely in possession of the property in question without having

any sort of right in it, she cannot be said to have possessed property in question within the meaning of Section 14 of the Hindu Succession Act. The expression used 'possessed by a female Hindu' and not 'in the possession of the female Hindu'. The female must have right or interest akin to ownership with a right to possession. In the present case, it was only Rangaiah, who was in cultivation of the land in question and not his daughter Akkayamma or his son Rangaswamaiah. Hence, held, the order of the Land Tribunal holding that it was Rangaiah only, who was entitled to grant of occupancy right, was correct and was upheld. Further held, Akkayamma never had any right to the possession of the land in question and hence, the argument that she became full owner of the land in question by virtue of Section 14 of the Act was not tenable and was rejected."

JOINT FAMILY AND SUFFICIENT NUCLEUS

K.V. Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer and others (MANU/SC/0307/1964 : AIR 1965 Supreme Court 289), wherein, Para No. 15 reads as under: "The legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown.

FATHERS SURETY FOR THIRD PARTY LIABILITY OF ANCESTRAL PROPERTY

Chabirani Bai and Ors. vs. Girdharilal and Ors.:
MANU/MP/0021/1976 - AIR 1976 MP 69 - Under

the Hindu Law, where the sons are joint with their father, they are under a pious obligation to pay the debts contracted by the father, which are not illegal or tainted with immorality, to the extent of their interest in the joint family property vide Hindu Law, by Mulla, Fourteenth Edition, at p. 354, This liability arises from the religious obligation of the son, as Laid down in the ancient texts. It is well settled that the liability of the sons exists whether the father be alive or dead.¹

The main point for consideration, therefore, is whether the pious obligation of a son exists even in respect of the father's liability under a surety bond. For this purpose it is necessary to consider whether a pecuniary liability incurred by the father on the basis of a surety bond is an avyavaharika debt or not. It appears that according to both Yajnaval-kya and Brihaspati, a debt under a surety bond is to be regarded as avyavaharika only where the surety is for the appearance or for the honesty of another person, but not where the surety is for payment to be made by a third person vide Hindu Law by Mulla, Fourteenth

¹ After 2005 amendment of Hindu Succession act pious obligation liability is removed.

Edition, Article 298, at pp. 386 and 387 and Hindu Law by Raghavachariar, Sixth Edition, at pp. 342 and 343.

In Dwarka Das v. Kishan Das, AIR 1933 All 58,7 it was held by a Division Bench of the Allahabad High Court that the sons are liable for the surety debt of their father for payment, even without consideration. A similar view was expressed by that Court in *Daljit Singh v. Harkishan Lal* **MANU/UP/0198/1939 : AIR 1940 All 116.**

The original texts on the subject were extensively considered by the Bombay High Court in *Tukaram Bhat v. Gangaram* **ILR (1899) 23 Bom 454.** The following observations at p. 459 in the said case are pertinent : "It will be sufficient to state that Brihaspati recognizes four different classes of sureties : (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money lent, (4) and sureties for delivery of goods. The obligation of the first two kinds of sureties is limited to themselves personally, and does not bind their sons; but the obligation incurred by the last two kinds of sureties binds them, and their sons also after their death. The commentary of Ratnakar on this text expressly states that the sons shall be compelled to pay debts incurred by their father under the last two classes of surety obligations. The texts of Narad and Yajna-alkya recognize three classes of surety obligations only--those for appearance, those for honesty and those for payment. Narad does not set forth the son's obligation in this

place, but the Yajnavalkya text is quite as explicit as that of Brihaspati. The sureties of the first two classes must pay the debt, and not their sons, but the sons of the last kind of surety may be compelled to pay their father's debt incurred by him as surety. Katyayana refers to the same kind of surety when he lays down that the grandson of such a surety need on no account pay the debt, but the son must make it good without interest. The text of Vyasa makes the same distinction between the son's and grandson's liabilities for such suretyship. Manu's texts on the subject clearly distinguish between sureties for appearance or good behaviour and sureties for payment. The son shall not, according to Manu in general be compelled to pay money due for suretyship, or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or for tolls or fines. The general words 'money due for suretyship' used in the text are expressly stated by the commentator Kulluka to refer only to sureties for appearance and good behaviour, but as regards a surety for payment, it is enjoined that the Judge may compel even his heirs to discharge the debt."

It is, therefore, clear that according to the authoritative texts on the subject, pecuniary liabilities arising out of surety bonds for appearance and for honesty of a third person alone can be considered as avyavaharika debts which the son is not under a pious obligation to pay; but a pecuniary liability arising out of a surety bond for the payment of money lent to a

third person stands on a different footing and the pious obligation of the son extends to such a liability.

Privy Council in *Kesar Chand v. Uttam Chand* **MANU/PR/0004/1945 : AIR 1945 PC 91**. In the said case their Lordships made the following observations at p. 94 : "In the present case, the security bond was executed not for the payment of any debt due by Uttam Chand, but for payment of a debt which was due from third parties. Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property."

The aforesaid decision of the Privy Council was extensively considered by & Full Bench of the Punjab High Court in *Hindustan Commercial Bank v. Sohanlal* **MANU/PH/0011/1970 - AIR 1970 P&H 67** - and distinguished on the ground that in that case no personal liability of the father arose under the surety bond. Adverting to the observations made by their Lordships of the Judicial Committee of the Privy Council in that case, it was held that they could not be construed as making any departure from the legal position as enunciated in *Tukaratn Bhat v. Gangaram* **ILR (1899) 23 Bom 454** (supra). It was held by the Court, after reviewing all the authorities on the subject, that the personal liability of the father to pay the third person's debt under a surety bond was neither an illegal nor an immoral debt and as such the joint family estate in the hands of the sons was liable

for payment of the same in view of their pious obligation.

A perusal of the judgment of the Privy Council in *Kesar Chand v. Uttam Chand* **MANU/PR/0004/1945 : AIR 1945 PC 91** (supra) shows that their Lordships did not take into consideration the various authoritative texts of Hindu Law and judicial decisions on the subject, apparently because they did not intend to make any departure from the principles of Hindu Law as recognized by the Courts. Their Lordships rested their decision on the sole consideration that in the case before them the father had not incurred any personal liability under the surety bond and as such there was no debt due from him. It is thus clear that the sons are under a pious obligation to pay the debt of the father arising out of a surety bond executed by him to pay a third person's debt. This liability is, however, only to the extent of their interest in the joint family property.

Their Lordships of the Supreme Court in **Faqir Chand vs Harnam Kaur case AIR 1967 SC 727** - MANU/SC/0286/1966 - have laid down the following propositions:--

(1) That the sons have no right to restrain the execution of the decree obtained by the mortgagee against the father, or the sale of the property in execution of that decree, where the mortgage is of the property of the joint family consisting of himself and his sons for payment of his debt when the mortgage is

not for legal necessity or payment of an antecedent debt, unless they show that the mortgage debt was incurred for Illegal or immoral purpose:

(2) That the liability of the son under the pious obligation extends to the joint family property in his hands;

(3) The second proposition laid down In Brij Narain's case AIR 1924 PC 50 Is founded upon the pious obligation of a son to pay the debt contracted by the father for his own benefit and not for any immoral or Illegal purpose. By incurring the debt, the father enables the creditors to sell the property in execution of a decree against him for payment of the debt. The son is under a pious obligation to pay all debts of the father whether secured or unsecured;

(4) That the second proposition in Brij Narain's case AIR 1924 PC 50 applies not only to an antecedent debt but also to a mortgage debt which the father is personally liable to pay;

(5) Even where the mortgage is not for legal necessity or for payment of an antecedent debt, the creditor can, in execution of a mortgage decree for the realization of a debt which the father is personally liable to repay, sell the estate without obtaining a personal decree against him. After the sale has taken place, the son is bound by the sale, unless he shows that the debt was non-existent or tainted with immorality or illegality;

(6) That the third proposition in Brij Narain's case AIR 1924 PC 50 does apply where the joint family consists of father and sons. A father, who is also the manager

of the family, has no power to mortgage his estate except for legal necessity or for payment of an antecedent debt. The decree against the father does not, of its own force, create a mortgage binding on the sons' Interest. The security of the creditor is not enlarged by the passing of the decree. In spite of the passing of the preliminary or final decree for sale against the father, the mortgage will not, as before, bind the sons' interest in the property and the sons will be entitled to ask for a declaration that their interest has not been alienated either by the mortgage or by the decree.

CHAPTER - 10
DOCUMENTS - EVIDENCE - PROOF - TITLE
VERIFICATION

ADVICE ON DOCUMENTATION

Economic Transport Organization vs. Charan Spinning Mills (P) Ltd. and Ors. (2010) 4 SCC 114 -

A document should be transaction-specific. Or at least an effort should be made to delete or exclude inapplicable or irrelevant clauses. But where a large number of documentation is required to be done by officers not-conversant with the nuances of drafting, use of standard forms with several choices or alternative provisions is found necessary. The person preparing the document is required to delete the terms/clauses which are inapplicable. But that is seldom done. The result is that the documents executed in standard forms will have several irrelevant clauses. Computerisation and large legal departments should have enabled insurance companies, banks and financial institutions to (i) improve their documentation processes and omit unnecessary and repetitive clauses; (ii) avoid incorporation of other documents by vague references; and (iii) discontinue pasting or annexing of slips. But that is seldom done. If documents are clear, specific and self-contained, disputes and litigations will be considerably reduced.

MODE OF PROOF OF SIGNATURE IN DOCUMENT AND A DOCUMENT ITSELF

In Baru Ram v. Smt. Prasanni 1959 AIR 93, 1959

SCR Supl. (1)1403, dealing with the mode of proof of signature of a person, the Supreme Court pointed out that: Section 67 of the Indian Evidence Act (1 of 1872) provides inter alia that if a document is alleged to be signed by any person the signature must be proved to be in his handwriting. Sections 45 and 47 of the said Act prescribed the method in which such signature can be proved. Under S. 45, the opinion of the handwriting experts is relevant while under S.47 the opinion of any person acquainted with the handwriting of the person who is alleged to have signed the document is admissible. The explanation to the section explains when a person can be said to be acquainted with the handwriting of another person. Thus, there can be no doubt as to the manner in which the alleged signature of the appellant could and should have been proved; but even assuming that the signature of the appellant can be legally held to be proved on circumstantial evidence the principle which governs the appreciation of such circumstantial evidence in cases of this kind cannot be ignored. It is only if the court is satisfied that the circumstantial evidence irresistibly leads to the inference that the appellant must have signed the form that the court can legitimately reach such a conclusion.

Apex Court in State (Delhi Administration) v. Pali Ram MANU/SC/0189/1978 : AIR 1979 SC 14, at page 23 which reads as follows: "Just as in English Law, the Indian Evidence Act recognizes two direct methods of proving the handwriting of a person.

(1) By an admission of the person who wrote it; and
 (2) By the evidence of some witness who saw it written.
 These are the best methods of proof. These apart, there are three other modes of proof by opinion. They are: (1) By the evidence of a handwriting expert (Section 45). (2) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question (Section 47). (3) Opinion formed by the Court on comparison made by itself (Section 73).

All these three cognate modes of proof involve a process of comparison. In mode (1), the comparison is made by the expert of the disputed writing with the admitted or proved writing of the person who is said to have written the questioned document. In (2), the comparison takes the form of a belief which the witness entertains upon comparing the writing in question, with an exemplar formed in his mind from some previous knowledge of repetitive observance of the handwriting of the person concerned. In the case of (3), the comparison is made by the Court with the sample writing or exemplar obtained by it from the person concerned."

**COMPARING THE DISPUTED SIGNATURE WITH
THAT OF ADMITTED SIGNATURE OR
HANDWRITING**

**Supreme Court in the case of AJIT SAVANT
MAJAGAVI VS. STATE OF KARNATAKA, (AIR 1997
SC 3255)**

"37. This section consists of two parts. While the first part provides for comparison of signature, finger impression, writing etc. allegedly written or made by a person with signature or writing etc. admitted or proved to the satisfaction of the Court to have been written by the same person, the second part empowers the Court to direct any person including an accused, present in court, to give his specimen writing or fingerprints for the purpose of enabling the Court to compare it with the writing or signature allegedly made by that person. The section does not specify by whom the comparison shall be made. However, looking to the other provisions of the Act, it is clear that such comparison may either be made by a handwriting expert under Section 45 or by anyone familiar with the handwriting of the person concerned as provided by Section 47 or by the Court itself.

38. As a matter of extreme caution and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signature with that of the admitted signature or handwriting and in the event of the slightest doubt, leave the matter to the wisdom of experts. But this

does not mean that the Court has not the power to compare the disputed signature with the admitted signature as this power is clearly available under Section 73 of the Act."

Division Bench of Delhi High Court in Nepal Singh v. Om Pal Singh reported in MANU/DE/0504/2005

: AIR 2005 Delhi 330, have held that not only the trial Court but also the appellate Court shall have the power under Section 73 of the Evidence Act to apply the test of comparison of writing in an appropriate case with sufficient care and caution. As a matter of prudence, Court may not base its findings solely on comparison made by the Court. But there could be no bar for the Court to take resort to the said power and compare the signatures and give its findings thereon which could be considered with the findings on other evidence on record. - Delhi High Court in this judgment with regard to the promissory note and suit for recovery of money, based on the pro-note-cum-receipt held that when the signatures of defendant in pro-note-cum-receipt is compared with his signatures appearing in other documents, which are on record, clearly prove and establish that all signatures are of the defendant and ordered to decree the suit to pay the suit claim with interest upholding the judgment.

Hon'ble Supreme Court in K.S. Satyanarayana v. V.R. Narayana Rao reported in MANU/SC/0422/1999 : AIR 1999 SC 2544, have

held as under: "7. A piquant situation had developed before the trial Court when the 1st defendant denied his signatures on the written statement and Vakalatnama in favour of his counsel. Trial Court should have immediately probed into the matter. It should have recorded statement of the counsel for the 1st defendant to find out if Vakalatnama in his favour and written statement were not signed by the 1st defendant whom he represented. It was apparent that the 1st defendant was trying to get out of the situation when confronted with his signatures on the Vakalatnama and the written statement and his having earlier denied his signatures on Exh. P-1 and Exh. P-2 in order to defeat the claim of the plaintiff. Falsehood of the claim of the 1st defendant was writ large on the face of it. Trial Court could have also compared the signatures of the 1st defendant as provided in Section 73 of the Indian Evidence Act.

Section 73 is reproduced as under:-- "Comparison of signature, writing or seal with others admitted or proved. 73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.The Court may direct any person present in Court to write any words or figures for the purpose of

enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.This section applies also, with any necessary modifications, to finger impressions."

Shakuntala Gupta and Ors. vs. Kiran Bhartia :

MANU/KA/8882/2019 - Keeping in view the principles laid down in the judgment of the Hon'ble Apex Court and also the judgments of the Delhi High Court referred supra and so also Section 73 of the Evidence Act, it is clear that there is no bar for the Court to take resort to the powers conferred under Section 73 of the Evidence Act to compare the signatures and give its findings there on which could be considered along with the findings and evidence on record. The Court below has failed to exercise the power available under Section 73 of the Evidence Act and has only proceeded on the wrong notion with regard to filing of eight cases against the defendant. The Court below ought not to have carried away with the filing of other cases and should have considered the material available on record in the present case. The Court below has not exercised its power under Section 73 of the Evidence Act and has only proceeded on a wrong notion that P.W. 2 is also having an interest against the defendant and such a conclusion as reached by the Court below is erroneous..... The defendant did not probabalize his case sending the documents to Handwriting

Expert, when the plaintiff probalilized the case of the plaintiff by examining P.W. 2 as well as voluminous documents are produced to prove the admitted signatures of defendant. Hence, the Court below has committed an error in dismissing the suit ignoring the material available on record and therefore, the same requires interference at the hands of this Court.

Orissa High Court in Iswar Chandra v. Ramnik Lal reported in MANU/OR/0043/1978 : AIR 1978 Orissa 156, has held that the comparison of signature on a disputed document with the proved signature by the Judge himself does not relegate him to the position of a witness. Where a Judge compares the signature on a document by way of corroboration to other evidence indicating that the defendant has taken loan from the plaintiff, it could not be said that the Court has committed any error in the procedure. Calling a handwriting expert may not always be possible or a desirable proposition.

SENDING DOCUMENT TO FORENSIC EXPERT

Madras High Court in a case of S. Chinnathai Versus K.C. Chinnadurai reported in MANU/TN/2281/2009: (2010) 3 MLJ 65 has observed as follows:-

"4. The word scientific investigation would also include sending the documents to a Forensic Expert in order to find out the truth or otherwise, as to whether a party to a suit has in fact signed the disputed document or not. Hence, the power is conferred under order 26 Rule 10A of the Civil Procedure Code to the Court to send a document to be compared with other admitted documents and get a report from the Forensic Expert.

8. The practice of either sending the copy of the original documents or directing the expert to come to the Court has been found to be impractical and difficult to implement. Moreover, there is no such procedure contemplated under the Civil Procedure as against the Order 26 Rule 10A of the Civil Procedure Code. It is a well known fact that the Science and Technology has improved in leaps and bounds and it is always desirable to have the assistance and aid of an expert. It is also a matter of fact that an expert cannot bring all his instruments before the court' for the purpose of finding out the fact that a party has signed the disputed document or not. Above all, it is nearly impossible for an expert to visit all the Courts throughout the state for the above said purpose. Therefore, this Court is of the opinion that the provisions contended under Order 26 Rule 10A of the Civil Procedure Code will have to be complied with by the Civil Court in letter and spirit by sending the document to the expert instead either asking the expert to come to the Court or sending a copy of the

document to the expert. It is also to be noted that it is very difficult for the expert to compare a copy of the original document. Similarly, it is always desirable for the Court to send the original document to the Government department while asking for a report. It is also to be noted, that there are not many Government experts with facilities in the State, in which there are number of Civil Courts."

Principles deduced

1. The civil Court is having jurisdiction to send the document to the Forensic Expert for comparing the signatures between the disputed documents with the admitted documents by appointing a Commissioner and get a report.
2. When the civil Court is exercising its power under Section 73 of the Indian Evidence Act, the civil Court will have to exercise its power under Order 26 Rule 10A of the Civil Procedure Code instead of invoking Section 73 of the Indian Evidence Act.
3. The Advocate Commissioner, being an officer of the Court can be asked to take the original document.
4. When the Advocate Commissioner takes the original document, then a certified copy of the same will have to be kept under the custody of the Court.
5. The civil Court cannot direct the disputed document to be compared with the vakalat or written statement of a party.
6. When the civil Court comes to the conclusion that the power under Order 26 Rule 10A of the Civil Procedure Code should be invoked, then the civil

Court shall invoke the same even without an application from the parties concerned in the interest of justice and in order to solve the dispute between the parties.

7. When a document is sent to an expert it should be sent only to the Government Department Expert and not to a private Expert. While sending a document to an expert, the original of the same has to be sent since it is not possible to compare the xerox copies with the other admitted documents.

8. The civil Court shall not dismiss an application seeking for the examination of the document by an expert on the ground of wrong quoting of provision of law and in such a case, the Court shall exercise under Order 26 Rule 10A of the Civil Procedure Code.

9. The civil Court shall exercise under Order 26 Rule 10A of the Civil Procedure Code even when a prayer is sought for a direction to summon the expert to the Court for the purpose of examining the document.

10. An application filed under Order 26 Rule 10A of the Civil Procedure Code will have to be filed at the earliest opportunity in the normal circumstances.

11. However, an application under Order 26 Rule 10A of the Civil Procedure Code cannot be dismissed merely on the question of delay alone, unless the same is willful and deliberate.

M. Narsi Reddy vs. V. Raghu Ram Naidu and Ors.
: MANU/AP/0046/2015 - 2015 (2) ALT 529 The petitioner, who is the principal borrower and

defendant No. 1 in the suit, filed I.A. No. 662 of 2013 under Section 45 of the Indian Evidence Act 1872 for sending the signatures on the promissory note to a handwriting expert for comparison with his admitted signatures available on record and also by taking his signatures in the open court. This application came to be dismissed by the Court below by the order under revision.

3. Admittedly, except the signatures subscribed by the petitioner after commencement of the suit, his contemporaneous signatures are not available in the case. In the absence of the admitted signatures, it is not feasible to compare the disputed signatures on the pronote with the signatures which were subscribed by the petitioner during the pendency of the suit. As the petitioner has been resisting the claim of the respondent all through, it is not safe to treat the signatures subscribed by him either in the vakalath or in the lower court as the admitted signatures, as they were subscribed for the purpose of contesting the suit and it is reasonable to presume that filing this application would have been in his contemplation while subscribing his signatures.

4. The learned Counsel for the petitioner placed reliance on the Judgment of this Court in Chidella Venkateswarlu Vs. Gurram Pushpa Latha MANU/AP/0291/2012 : 2012 (4) ALT 445. No parallel can be drawn between the facts of that case and that of this case for the reason that in that case, it is the plaintiff who filed an application for sending the

defendant's signatures on the written statement for being compared with the signatures on the disputed pronote. When the plaintiff has accepted the signature of the defendant as the admitted signature, there can be no objection to the Court to send the same for expert's opinion. The present one is a converse case where the defendant himself wants his signatures available in the suit record to be treated as admitted signatures. The plaintiff cannot be put to the risk of sending such signatures for expert's opinion unless he has agreed for the proposal of the defendant.....

Ramasamy Udayar vs. Pavoornamal: 2014-2-LW 242 - MANU/TN/0516/2014

I am inclined to follow the decision of the Division Bench of this Court rendered in Central Bank of India v. Antony Hardware Mart (MANU/TN/2630/2005 : 2006 3 L.W. 58) subsequent to the decision cited by the learned counsel for the respondent as per which it is the duty of the plaintiff to establish his case when the defendant denied the execution of the promissory note. The plaintiff having failed to discharge the burden cast upon him, cannot take advantage of the fact that the Court had compared the signatures and found the signature of the defendant to be the same. As stated earlier, the plaintiff either should have taken out an application to send the document to an expert and proved the execution or should have proved the execution of the document in any other means, viz., oral evidence, etc. Having failed to discharge the

burden cast upon the plaintiff, he cannot be allowed to succeed. The substantial question of law is answered accordingly in favour of the appellant.

CARELESSNESS IN TITLE SEARCH IS AT HIS OWN PERIL

Maya Devi vs. Lalta Prasad (19.02.2014 - SC) : MANU/SC/0122/2014: Decree Holder failed altogether to disprove the title of appellant, and he had maintained that the Defendant/Judgment Debtor was the owner, which is admittedly not the legal position--If the Decree Holder has been defrauded by defendant/Judgment debtor, largely because of former's careless disregard to conduct a title-search, he must face the legal consequences; they cannot be transferred/imposed upon a third party to its detriment--Objections filed by appellant under Order 21 Rule 58 allowed--Appeal allowed.

MORTGAGE OF LEASEHOLD LAND OF GOVERNMENT TO BANK - IMPROPER TITLE VERIFICATION

State of Uttar Pradesh and Ors. vs. United Bank of India and Ors.: MANU/SC/1353/2015 - (2016) 2 SCC 757

38. In the present case there was nothing on the record to show that the lessee i.e. (ABP) has obtained any written sanction from the lessor i.e. Government before mortgaging his leasehold interest in the Nazul Land. Meaning thereby the mortgage

done by the lessee in favour of the Bank itself is bad in law, which was done in clear violation of the terms of the lease deed i.e. mortgage of the Nazul land without previous sanction in writing of the State.

39. In the present case the Appellant-Bank, which is a nationalized bank before lending public money by way of loan as against the security of disputed property by way of depositing title deed, was supposed to verify the title of the mortgagor in respect of the disputed property. But neither any evidence nor a single sheet of paper has been produced by the Bank to show that the title of the mortgagor was verified and non-encumbrance certificate in respect of disputed property was obtained or no objection from the State Government was taken by the Bank. Further, even if we hold that the mortgage was valid, in the cases of government grant, the government is very much a necessary party and the Calcutta High Court should not have passed the so called compromise mortgage decree without issuing notice to the Government. This is an infirmity done by the High Court and accordingly the mortgage decree is bad in law. Moreover, the High Court should have taken into account the fact that the ABP Company is only have the leasehold interest and the Bank could not have been given right to auction the property as the ABP had only limited right which had expired in the year 1987.

40. The High Court of Allahabad also erred in giving the direction to convert leasehold interest as freehold interest in favour of the Bank by applying the

doctrine of legitimate expectation for issuing the writ of mandamus against the State, which in our view is not the correct approach of the High Court.

43. The High Court after having recorded a finding that the Bank being the nominee of the mortgagee has a right to make an application for conversion of Nazul land into a freehold land, without appreciating the fact that the Bank has not having any subsistence interest in the leasehold property obtained a mortgage decree behind the back of the State being the paramount title holder applied the doctrine of legitimate expectation.

44. In the instant case, admittedly, the State never recognized the Appellant Bank as a mortgagee. Further the State was not aware about the alleged mortgage said to have been created by the lessee ABP Company by deposit of Lease document. Moreover, the State never represented or promised either to the lessee or to the Bank to give any benefit under the lease. In such circumstances, we are of the definite opinion that the High Court has committed grave error in applying the doctrine of legitimate expectation in favour of the bank.

INSTRUMENT NOT DULY STAMPED CANNOT BE ADMITTED IN EVIDENCE

In Omprakash v. Laxminarayan and Ors., 2013 (12) SCALE 441, the Supreme Court has held as under:-
 "12. From a plain reading of the aforesaid provision, it is evident that an authority to receive evidence shall

not admit any instrument unless it is duly stamped. An instrument not duly stamped shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, of the amount required to make up such duty together with penalty. As we have observed earlier, the deed of agreement having been insufficiently stamped, the same was inadmissible in evidence. The court being an authority to receive a document in evidence to give effect thereto, the agreement to sell with possession is an instrument which requires payment of the stamp duty applicable to a deed of conveyance. Duty as required, has not been paid and, hence, the trial court rightly held the same to be inadmissible in evidence.

Court in Avinash Kumar Chauhan v. Vijay Krishna Mishra [(2009) 2 SCC 532] , in which it has been held as follows:

21. It is not in dispute that the possession of the property had been delivered in favour of the appellant. He has, thus, been exercising some right in or over the land in question. We are not concerned with the enforcement of the said agreement. Although the same was not registered, but registration of the document has nothing to do with the validity thereof as provided for under the provisions of the Registration Act, 1908.

22. We have noticed hereto before that Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The court being

an authority to receive a document in evidence is bound to give effect thereto. The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The court, therefore, was empowered to pass an order in terms of Section 35 of the Act."

24. From the above, it is clear that a non-stamped agreement cannot be received in evidence, however, if the amount of duty along with the penalty is paid, then the same can be admitted in evidence.

Hindustan Steel Ltd. vs. Dilip Construction Co., (1969) 1 SCC 597 the Supreme Court has also held that the non-stamping of a document is a curable defect: - "7. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments: It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument....."

Supreme Court in S. Kaladevi vs V.R. Somasundaram & Ors.- MANU/SC/0246/2010 : (2010) 5 SCC 401, has clarified the position as to the scope within which the proviso to Section 49 of the Registration Act would operate. The Supreme Court

noted that Section 17 of the Registration Act 1908 is a disabling section. The documents defined in clauses (a) to (e) therein require registration compulsorily. Accordingly, sale of immovable property of the value of Rs. 100/- and more requires compulsory registration. Part X of the 1908 Act deals with the effects of registration and non- registration. Section 49 gives teeth to Section 17 by providing effect of non-registration of documents required to be registered. It provides that no document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall (a) affect any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. Proviso to Section 49 however limits the exception to that restriction and stipulates that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 to be registered, may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of any collateral transaction not required to be effected by registered instrument. The law with regard to scope of applicability of proviso to Section 49 was succinctly stated by the Supreme Court in para 12 of the report in the following terms: "12. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not

affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act."

The Supreme Court in Sita Ram Bhama vs. Ramavtar Bhama-MANU/SC/0284/2018 : (2018) 15 SCC 130, held that in a suit for partition, an unregistered documents can be relied upon for collateral purpose with the severance of title, nature of possession of various shares and not for a primary

purpose i.e. division of joint properties by metes and bounds.

The Supreme Court in Roshan Singh vs. Jile Singh-MANU/SC/0679/1988 : (2018) 14 SCC 814, held that a partition may be affected orally, but subsequently, if it is reduced in the form of document, that document purports itself to effect a division and embodies terms of bargain, it will be necessary to register it. Proviso to Section 49 allows documents which would otherwise be excluded, to be used as an evidence of any collateral transaction not required to be effected by a registered instrument.

The Allahabad High Court in Ratan Lal & Ors. Vs. Harisankar & Ors.-MANU/UP/0198/1980 : AIR 1980 Allahabad 180 while discussing the meaning of term "collateral purpose" held that since the appellant wanted to extinguish the right of the respondent with the help of the unregistered tenancy, the same was not a collateral purpose. Para 4 of the report are opposite to quote:- "The second contention was that the partition deed, even if it was not registered could certainly be looked into for a collateral purpose, but the collateral purpose has a limited scope and meaning. It cannot be used for the purpose of saying that the deed created or declared or assigned or limited or extinguished a right to immovable property..... term 'collateral purpose' would not

permit the party to establish any of these acts from the deed."

In the case of Bajaj Auto Ltd. vs. Behari Lal Kohli-MANU/SC/0327/1989 : AIR 1989 SC 1806, the Supreme Court held that if a document is inadmissible for non-registration, all its terms are inadmissible including the one dealing with landlord's permission to his tenant to sub-let and therefore none of the terms of the lease can be admitted in evidence and further that to use a document for the purpose of proving an important clause in the lease is not using it as a collateral purpose.

In Rai Chand Jain Vs. Chandra Kanta Khosla-MANU/SC/0185/1991 : AIR 1991 SC 747 also similar view was taken by the Supreme Court as would be evident from the following exceptions made in paragraph 10 of the judgement, which reads as under:- "10. the lease deed Ex. P1 dated 19th May, 1978 executed both by the appellant and the respondent i.e. the landlady and the tenant, Rai Chand Jain, though unregistered can be considered for collateral purposes and as such the findings of the Appellate Authority to the effect that the said deed cannot be used for collateral purposes namely to show that the purpose was to lease out the demised premises for residential purposes of the tenant only is not at all legally correct. It is well settled that unregistered lease executed by both the parties can be

looked into for collateral purposes. In the instant case the purpose of the lease is evident from the deed itself which is as follows: "The lessor hereby demises House No. 382, Sector 30-A, Chandigarh, to lessee for residential purposes only". This clearly evinces that the property in question was let out to the tenant for his residence only...."

In the case of Rana Vidya Bhushan Singh Vs. Ratiram-MANU/SC/0562/1969 : 1969 (1) UJ 86 (SC), the following law was laid down: "A document required by law to be registered, if unregistered, is inadmissible as evidence of a transaction affecting immovable property, but it may be admitted as evidence of collateral facts, or for any collateral purpose, that is for any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immovable property. As stated by Mulla in his Indian Registration Act, 7th En., at p. 189: "The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the former Chief Court of Oudh; the Judicial Commissioner's Court of Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it."

The Supreme Court in Government of A.P. vs. P. Laxmi Devi-MANU/SC/1017/2008 : (2008) 4 SCC

720 held that it is incumbent upon the Court to impound the document unstamped or insufficient stamped. Para 16 of the report, which is relevant, is reproduced hereinunder: "16. A perusal of the said provision shows that when a document is produced (or comes in the performance of his functions) before a person who is authorized to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instrument is produced to impound the document if it is not duly stamped. The use of the word 'shall' in Section 33(1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In our opinion, the word 'shall' in Section 33(1) does not mean 'may' but means 'shall'. In other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions. Hence the view taken by the High Court that the document can be returned if the party does not want to get it stamped is not correct."

The Supreme Court in a recent judgement in Gangappa & Anr. vs. Fakkirappa-MANU/SC/1484

/2018 : (2019) 3 SCC 788 in the scope of Section 34 of the Karnataka Stamp Act 1957 (analogous to Section 39 of the Rajasthan Stamp Act) was considering the question whether the trial court while admitting an insufficiently stamp document, could have exercised its discretion in imposing penalty 2 times of deficient amount of stamp duty or it was obligatory for the trial court to impose the penalty at the rate of 10 times. Analysing the provision of Section 38 of the Karnataka Stamp Act (which is analogous to Section 43 of the Rajasthan Stamp Act), the Supreme Court held that the Deputy Commissioner under that provision is empowered to refund any portion of the penalty in excess of five rupees, which has been paid in respect of such instrument. Since sub-section (1) of Section 38 uses the expression "if he thinks fit", he also has the discretion to impose penalty of 10 times in the facts of the particular case. Affirming the view of division bench of the Karnataka High Court in earlier judgement of *Digambar Warty and Others vs. District Registrar, Bangalore Urban District and another*, MANU/KA/2398/2012 : ILR 2013 KAR 2099 that there is no discretion vested with the authority impounding the document in the matter of collecting duty under Section 33 and 34, the Supreme Court held that the word "shall" used in those provisions has rightly been interpreted by the High Court.

Supreme Court in *Peteti Subba Rao vs. Anumala S. Narendra* (2002) 10 SCC 427 wherein it was held

that the Court can admit such instrument only on payment of deficit stamp duty with 10 times of the penalty suggested as a way out. It was further held that when a person is not willing or cannot afford to pay the same, the only available course open for the Court to adopt is the one envisaged in Section 38 of the Stamp Act. The following discussion made by the Supreme Court in para 6 of the report is worth quoting: "6..... We find some force in the said plea. In a case where the party fails to pay the penalty suggested by the court the document impounded has to be sent to the Collector for the purpose of taking further steps in respect of that document as provided in Section 40 of the Act. The Collector has the power to require the person concerned to pay the proper duty together with a penalty amount which the Collector has to fix in consideration of all aspects involved. The restriction imposed on the Collector in imposing the penalty amount is that under no circumstances the penalty amount shall go beyond ten times the duty or the deficient portion thereof. That is the farthest limit which meant only in very extreme situations the penalty need be imposed up to that limit. It is unnecessary for us to say that the Collector is not required by law to impose the maximum rate of penalty as a matter of course whenever an impounded document is sent to him. He has to take into account various aspects including the financial position of the person concerned."

The Supreme in Chila Kuri Gangulappa vs. Revenue Divisional Officer-MANU/SC/0169/2001

: (2001) 4 SCC 197 - AIR 2001 SC 1321 also similarly held that if the appellant agrees to remit the amount of stamp duty and the penalty, the Court can proceed with the trial after admitting the document in evidence. If, however, he is unwilling to do so, the Court shall forward original of the document itself to the Collector for the purpose of adjudicating the question of deficiency of the stamp duty. The following observation in para 13 of the report, are worth quoting: "13. In the present case the trial court should have asked the appellant, if it finds that the instrument is insufficiently stamped, as to whether he would remit the deficient portion of the stamp duty together with a penalty amounting to ten times the deficiency. If the appellant agrees to remit the said amount the court has to proceed with the trial after admitting the document in evidence. In the meanwhile, the court has to forward a copy of the document to the Collector for the purpose of adjudicating on the question of deficiency of the stamp duty as provided in Section 40(1)(b) of the Act. Only if the appellant is unwilling to remit the amount the court is to forward the original of the document itself to the Collector for the purpose of adjudicating on the question of deficiency of the stamp duty. The penalty of ten times indicated therein is the upper limit and the Collector shall take into account all factors concerned in deciding as to what should be the proper

amount of penalty to be imposed.", in similar circumstances, held that if the party agrees to remit the amount of stamp duty and penalty levied by the Court, the Court has to proceed with the trial after admitting the document in evidence. If the party is unwilling to remit the amount, the Court is to forward the original of the document itself to the collector for the purpose of adjudicating on the question of deficiency of the stamp duty. Sub-section (2) of Section 37 of the Act provides that in every other case, the person so impounding an instrument shall send it in original to the Deputy Commissioner. While Subsection (1) of Section 37 of the Act provides that after payment of penalty as provided by Section 34 or all duty as provided by Section 36, the person impounding shall send to the Deputy Commissioner an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Deputy Commissioner or to such person as he may appoint in this behalf. Therefore, in-line with the ruling of the Hon'ble Supreme Court in the case of Chilakuri Gangulappa (supra) and in view of Sub-section (2) of Section 37 of the Act, the trial Court may proceed to send the instrument in original to the Deputy Commissioner. The Deputy Commissioner, may exercise his powers under Section 38 of the Act to refund the penalty paid under Sub-section (1) of Section 37 of the Act.

Smt. Savithramma R.C. Vs. M/s. Vijaya Bank and Another reported in MANU/KA/3667/2014 : ILR 2015 KAR 1984, 2015 (3) KCCR 2479 at paragraph 7, it was held that after impounding the document, the Court may proceed under Section 37(2) of the Act and shall send the impounded instrument in original to the Deputy Commissioner to be dealt with under Section 39 of the Act.

Mohammedsab vs. Rukminibai - 2019 (1) KCCR 936 : MANU/KA/5830/2018 - In the present case, the petitioner is not willing to pay the stamp duty in terms of the impugned order and therefore the next course of action open to the trial Court is to forward the original instrument to the Deputy Commissioner as provided under Sub-section (2) of Section 37 of the Act. The trial Court may also fix a definite period within which the Deputy Commissioner is required to adjudicate, collect the stamp duty and send back the original document to the Court.

Rajasthan High Court in Sanjeev Bhardwaj and Ors. vs. Yogeshwar Swaroop Bhatnagar and Ors. MANU/RH/0957/2019 - Decided on 04-09-2019, In the light of the discussion aforesaid, the third question whether on production of unstamped document, the Court is duty bound to determine the stamp fee along with penalty, as per Section 35(1) of the Act or to impound the same under Section 33 of the Act and send the same to the Collector for

determination of stamp duty and penalty in order to make the document admissible, is answered in the terms that if any instrument is presented before the Court, which is not duly stamped or insufficiently stamped, the Court is duty bound to impound the same and; (i) if the party who produces such instrument in evidence is willing to pay the stamp duty or deficit stamp duty together with amount of penalty, to determine the same and upon deposit of the amount, so determined, with the Court, it shall be open for the Court to admit the instrument in evidence, or; (ii) in the event, however, the party which produces such instrument does not agree or is unable to remit the amount of stamp duty/deficit stamp duty and the penalty, the Court shall send the impounded instrument to Collector for determination of stamp duty and penalty, which shall be, only upon production/receipt of the certificate/endorsement of deposit thereof, received in evidence.

EL Roi Praise and Prayer House vs. Mary Elezabeth : MANU/KA/3878/2018 - Section 37 of the Act of 1957 clearly mandates that the Court impounding a document admitted in evidence shall send the same in original to the jurisdictional Deputy Commissioner for determination of the stamp duty and penalty, stating the amount of duty and penalty levied in respect thereof. Therefore, no fault can be found in the view taken in the order impugned.

United Precision Engineers Pvt. Ltd., vs. KIOCL LTD.: MANU/KA/0648/2016 : ILR 2016 KAR 1707

11. From the provisions contained in Sections 33, 34, 37(1) (2), 38, 39 of the Karnataka Act, 1957, the view expressed by the Hon'ble Supreme Court and the Hon'ble Division Bench, the position of law is therefore clear that the obligation cast on the Civil Court in respect of an instrument not being duly stamped, is to impound the same and determine the duty and penalty payable. The Civil Court has no discretion, but to impose the penalty of ten times of the deficit and permit the party to pay the same. If the party chooses to pay the same, the effect of impounding gets diluted and the document will become admissible in evidence for the purpose of proving the same as per law. In such event, the Civil Court is required to despatch an authenticated copy of the instrument along with the deficit duty and penalty collected, to the Deputy Commissioner. The matter does not stop at that. Though the Civil Court as bound by law would collect the penalty at ten times, the power is still vested with the Deputy Commissioner under Section 38 of the Karnataka Act, 1957 to hold an enquiry and reduce the penalty in the manner as provided therein. ...

"14. In that regard, the phrase 'In every other case' contained in sub-section (2) of Section 37 of the Karnataka Act, 1957 will have to be understood to include not only an instrument which is merely impounded and referred but also an instrument impounded, relating to which the duty and penalty is

determined but not paid by the party concerned. Thus if Sections 37, 38 and 39 of the Karnataka Act, 1957 are collectively considered and read in harmony, since in respect of an instrument referred under Section 37(1), Section 38 provides only for refund of the penalty, it will have to be held that in a case where the Impounding Authority has by a considered order determined the deficit duty and penalty and thereafter referred the impounded instrument under sub-section (2) of Section 37 of the Act, the Deputy Commissioner will have the power only to consider with regard to the reduction of penalty in the manner as it would be done under Section 38 of the Act. Therefore, there is no other option for the Court impounding an Instrument but to send it to the Deputy Commissioner. In fact this is also the view of the Hon'ble Supreme while considering similar provision under the Stamp Act, 1899.

15. In view of the above conclusion, in the instant case, though the instrument was impounded by this Court in W.P. No. 44482/2014 and on direction issued therein the stamp duty and penalty was determined, it does not take away the liberty of the petitioner to seek that the impounded instrument be sent to the Deputy Commissioner in a circumstance where the Court concerned had not sent it as per the requirement under the Act. Hence, the order dated 10.03.2014 dismissing the application will not be justified. As already noticed, if the procedure contemplated in Section 37(1) of the Act is not availed

and the suit is not continued, the proceedings before the Court will be stalled. In that regard, if the instrument concerned is the document without which the suit cannot be proceeded with as in the instant case, the course to be adopted will have to be in the manner indicated in the case of *Peteti Subba Rao* (supra) i.e., the Court sending it to the Deputy Commissioner will set a time frame and if it receives the certificate and the order of the Deputy Commissioner, it will proceed with the suit. If within the time frame the instrument is not received, it may thereafter dismiss the suit and revive it as and when the certificate is received subsequently."

Hon'ble Supreme Court in the case of *Peteti Subba Rao v. Anumala S. Narendra* [(2002) 10 SCC 427].

In the said case, in a situation where the trial Court had determined the stamp duty, as also the penalty and had directed the deposit of such stamp duty, as also penalty within a month, failing which it had directed dismissal of the suit and the said order had been affirmed by the High Court, the Hon'ble Supreme Court had set aside the orders and directed reference to the Collector. The consideration as made by the Hon'ble Supreme Court is as hereunder: "5. Chapter IV of the Indian Stamp Act contains provisions regarding "instruments not duly stamped". It is Section 35 which falls under the said chapter which empowered the trial Court to direct the party (who wants the document to be acted upon) to pay the

stamp duty (or the deficient portion) together with a penalty of rupees fifteen, or, when ten times the amount of the proper duty or deficient portion thereof exceeds fifteen rupees, of a sum equal to ten times such duty or portion. This is for the purpose of enabling the document to be admitted in evidence, in such a situation the document would be admitted only on payment of the aforesaid sum. In a case where the party is not willing or he cannot afford to pay the said sum the court has to adopt the procedure envisaged in Section 38 (2) of the Act. That sub-section is with reference to the action which the trial court is, perforce to adopt under Section 33 (1) of the Act.

6. Mr. M.N. Rao, learned Senior Counsel submitted that the appellant cannot afford to pay the penalty now suggested as the amount is far beyond his capacity. But at the same time, he made a fervent plea that his suit cannot be allowed to be dismissed on the ground of inability to pay the huge penalty amount alone. We find some force in the said plea. In a case where the party fails to pay the penalty suggested by the court the document impounded has to be sent to the Collector for the purpose of taking further steps in respect of that documents as provided in Section 40 of the Act. The Collector has the power to require the person concerned to pay the proper duty together with a penalty amount which the Collector has to fix in consideration of all aspects involved. The restriction imposed on the Collector in imposing the penalty amount is that under no circumstances the penalty

amount shall go beyond ten times the duty or the deficient portion thereof. That is the farthest limit which meant only in very extreme situations the penalty need be imposed up to that limit. It is unnecessary for us to say that the Collector is not required by law to impose the maximum rate of penalty as a matter of course whenever an impounded document is sent to him. He has to take into account various aspects including the financial position of the person concerned.....

8. We also direct the Collector concerned to complete the proceedings envisaged in Section 40 (1) of the Act within a period of one month from the date of receipt of the document. The trial court shall await the receipt of the certificate of the order passed by the Collector for proceedings further in the suit. In other words the suit will be revived only on receipt of such certificate and the copy of the order of the Collector so passed."

K. Amarnath v. Smt. Puttamma - MANU/KA/0251/2000 : 2000 (4) Kar. L.J. 55 wherein while advertng to the provision contained in Sections 33, 34, 35, 37 and 40 of the Karnataka Act, 1957, it is held that if the party does not pay the duty and penalty, the Court will have to pass an order impounding the document and send the instrument in original to the District Registrar for being dealt with in accordance with law as per Section 37(2) of Karnataka Act, 1957.

Hon'ble Division Bench of this Court in the case of Digambar Warty and Others v. District Registrar, Bangalore Urban District and Another 2013 (4) KCCR 2700 : MANU/KA/2398/2012 : ILR 2013 KAR 2099), wherein after exhaustively considering all aspects, it is held as hereunder:

"37. Section 37 of the Act deals with the procedure to be followed by the authority after impounding the document under Section 33 and after passing of the orders under Section 34 or Section 36. When the person impounding an instrument under Section 33 has by law or consent of parties authority to receive evidence and admits such an instrument in evidence upon payment of a penalty as provided by Section 34 or of duty as provided by Section 36, under Sub-Section(1) of Section 37, he shall send to the Deputy Commissioner an authenticated copy of such instrument together with a certificate in writing, stating the amount of duty and penalty, levied in respect thereof and shall send such amount to the Deputy Commissioner or to such person as he may appoint in this behalf Sub-section (2) of Section 37 provides that in every other case, the person so impounding an instrument shall send it in original to the Deputy Commissioner.

38. The reason is obvious. Generally, it is the Civil Court which receives the instrument in evidence. Admission of instrument in evidence is not proof of the said instrument. If the execution of the instrument is denied by the executant or the opposite party, burden

is cast on the person producing the said instrument to prove that the instrument was executed in accordance with law. He may have to examine the attesting witnesses if there is any, or he may request the Court to compare the signature found on the said instrument with the admitted signatures in the case or he may request for sending the said instrument containing the signature for the opinion of the handwriting expert. Therefore the original document, after it being impounded and the party paying the duty and penalty cannot be sent to the Deputy Commissioner, the law provides for a authenticated copy of such an instrument being sent to the Deputy Commissioner. However, in all other cases, it is the original of the document impounded which is to be sent to the Deputy Commissioner. The object being, the said provision should not come in the way of speedy disposal of cases before the Court.

39. Section 38 of the Act deals with the power of the Deputy Commissioner to refund the penalty paid under Sub-section (1) of Section 37. When a copy of an instrument is sent to the Deputy Commissioner under Sub-section (1) of Section 37, he may, if he thinks fit, refund any portion of the penalty in excess of five rupees which has been paid in respect of such instrument. The reason being, when a person receiving the evidence impounds the document and collects the duty under Section 34 of the Act, which in most of the cases, is the Civil Court, the time of the Court should not be wasted in deciding, whether it is

a fit case where penalty of ten times the duty is to be levied or a case is made out for imposition of lesser penalty. Therefore, the Legislature consciously has used the word, 'shall' taking away any discretion in the Civil Court in the matter of imposition of penalty equal to ten times the duty payable. However, the Civil Court after impounding the document, collecting the duty and penalty, is under a statutory obligation to send it to the Deputy Commissioner under Sub-section (1) of Section 37. Therefore, when such an instrument is so sent to the Deputy Commissioner, he has been conferred the power to reduce the penalty already paid before the Civil Court. One of the reasons why such a discretion is not vested with the Civil Court is, it is the revenue authorities who are more concerned with the collection of revenue, and that is not the job of the Civil Courts. However, if a document which is not stamped or insufficiently stamped is tendered in evidence in Civil Court and admitted in evidence, then the very purpose of the Stamp Act itself would be defeated. Therefore, a power is vested in Civil Court to impound the document. In fact, it is an obligation cast on the Civil Court by the statute. But, the legislature does not want to burden the Civil Court to go into the question, whether a case for payment of lesser penalty is made out or not. The Civil Courts cannot be expected to be wasting their precious judicial time in deciding matters which exclusively fall within the sphere of revenue authorities and under the scheme of the Act, which has to be decided by

them. Therefore, it prescribes that after determining the duty payable on such instrument, to collect the duty with ten times penalty and then transmit the document to the Deputy Commissioner with duty and penalty so collected. Thereafter, a power is conferred on the Deputy Commissioner under Section 38 of the Act to hold an enquiry after giving an opportunity to the person who has paid duty and penalty to extend the benefit of reduction of penalty. Such a reduction in penalty is available to both the documents i.e., tendered before the Civil Court or produced directly before the Deputy Commissioner under Section 33. No discrimination in law is made between these two types of documents. However, there appears to be some conflicting opinion in this regard.

Court in the case of **Huchamma and others vs. Chandrashekar and another** [MANU/KA/1533/2014 : AIR 2014 Karnataka 133] has held that the order imposing a penalty of Rs. 5/- in respect of production of document insufficiently stamped would not be sustainable being wholly illegal and without jurisdiction. It is observed that the Civil Court has no jurisdiction to impose a penalty less than 10 times and the penalty payable on the agreement of sale is therefore 10 times found to be deficit by the trial Court.

B.K. Narayana Singh vs. H.H. Mohum Shumshere Jung Bahadur [MANU/KA/0193/1962 : AIR 1963

Mys 244 - In this case their lordships have referred to Section 32 of the Mysore Stamp Act, 1957, which provided for issuance of certificate by Collector referring to Section 32 i.e. when an instrument is brought to before the Collector under Section 31, is in his opinion one of the discretion and the Collector determines whether it is already fully stamped or the duty determined by the Collector with a duty already paid in respect of instrument, is equal to duty so determined, has been paid, the Collector/Deputy Commissioner shall certify by an endorsement on such instrument that the full duty with which it is chargeable has been paid. When such certificate is affixed on a document deemed to be duly stamped under Section 32 cannot come within the scope of Section 33.

Gnyaneshwar Sindol and Ors. vs. Sumitra Bai and Ors. : MANU/ KA/ 2479/ 2017 - After referring Digambar Warty and Others v. District Registrar, Bangalore Urban District and Another (MANU/KA/2398/2012 : ILR 2013 KAR 2099, In the light of the said judgment, it can be held that Section 38 and 39 of the Act confers power on the Deputy Commissioner to levy penalty on an insufficiently stamped instrument or an instrument which is not stamped at all, less than ten times the penalty payable thereon under Section 34 of the Act. The said order reducing the penalty should not be arbitrary or whimsical, as otherwise it may give scope for abuse of

such power and the very intention of the Legislature enacting the provision for penalty would be defeated. The discretionary power vested with the Deputy Commissioner while determining the duty and penalty is not exercised with judicious mind by the District Registrar while determining the stamp duty at Rs. 99,130/- and the penalty at Rs. 9,015/-.

Dandamudi Ramesh and Ors. vs. Sharnappa and Ors. 2017 (1) KCCR 810: MANU/KA/1028/2017 : ILR 2017 KARNATAKA 3421 - Sections 31 and 32 of the Act provide for adjudication of stamp duty. Under Section 31, it is open to the executant of any instrument to produce the document before the Deputy Commissioner, and require him to adjudicate on the question whether the document should bear any stamp duty. The Deputy Commissioner, thereupon should adjudicate stamp duty with which payment can be made to avoid impounding the document by a Court of authority empowered to receive the document in evidence. The said procedure could have been followed by the petitioners instead of buying the stamp papers and producing along with the plaint which does not meet the requirement of law. In the present case, the plaintiffs did not approach the Deputy Commissioner for adjudication as to the proper stamp duty i.e., in exercise of the power under S. 31 of the Act. The plaintiffs have not produced the certificate of Deputy Commissioner as per the provisions of S. 32 of the Act. Merely because

the deficit stamp duty payable in respect of the agreement dated 10.06.2008 was produced along with the plaint, it cannot be construed that such an act amounts to adjudication and certification by the Deputy Commissioner as per the provisions made under Ss. 31 and 32 respectively of the Act.

Lalithamma vs. T.R. Ramakrishna 2016 (4) Kar LJ 438 : MANU/KA/1755/2016 - Once impounded by civil court, document cannot be allowed to taken back to produce before DR. It is appropriate and apt to observe at this juncture itself that Trial Court has noticed that under Sections 33 and 34 of the Karnataka Stamp Act, 1957 an insufficiently stamped document when tendered in evidence before Court has to impound the said document and as such, it impounded said document by order dated 28-7-2015 and there was no question of permitting the defendant to take return of said document for being produced before the District Registrar for quantification of duty and penalty and also when duty and penalty has been quantified by the Registry on direction of Trial Court.

Suman v. Vinayaka and Others MANU/KA/3607/2013 : 2014 (1) Kar. L.J. 575 noticed that Trial Courts in recent times are not exercising the power vested under Section 34 for impounding the document, despite note of caution given by the Division Bench in Digambar Warty's case. It has been held in Suman's case, that Trial Court is bound to

impose penalty of ten times and collect the requisite stamp duty. It has been further held as under: "21. Insofar as levy of stamp.....deficient portion thereof. Hence, Point Nos. (ii) and (iii) is answered by holding that when the Court impounds document under Section 33 or 34 and when such instrument or document is tendered in the course of evidence, Court has to necessarily levy duty chargeable on such instrument together with penalty as prescribed under clause (a) of proviso to Section 34 without sending the same under sub-section (2) of Section 37 for being adjudicated by the Deputy Commissioner under Section 39. Section 33 can be invoked by Court as well as by every person in-charge of a public office. However, Section 34 can be invoked only by such person who by law or by consent of parties has authority to receive a document in evidence."

Division Bench of Court in the case of J.S. Paramesh v. Smt. Indramma MANU/KA/0223/2008 : 2008 (5) Kar. L.J. 502 (DB) : 2008 (3) KCCR 2061 (DB), whereunder it has been clearly held where a document which is insufficiently stamped is sought to be tendered in evidence, then such Court would be required to impose penalty of ten times the stamp duty.

K. Govinde Gowda v. Smt. Akkayamma and Others¹ MANU/KA/1455/2011 - 2012 (4) Kar. L.J.

240 - 2011 (4) KCCR 2799 - Therefore, instead of holding the rigid provision regarding levying penalty 10 times the duty as being unconstitutional, by applying the Doctrine of Harmonious Construction and reading down the provision, it is to be held that the Courts under Section 34 of the Act shall also have similar power like Deputy Commissioner under Section 39(1)(b) of the Act to levy penalty not more than 10 times if the Court thinks fit and proper.

At the cost of repetition, it is to be said that provisions of Sections 34 and 39 gives a distinction to the Court and the authority to levy penalty of Rs.5/- apart from collecting deficit stamp duty or in the alternative can levy penalty not more than 10 times in appropriate cases. The Court or the Deputy Commissioner shall have to take into consideration the literacy of the parties, the nature of transaction and their financial capacity while levying the penalty. However, while levying alternative penalty not more than 10 times, normally the Court or the Deputy Commissioner shall levy penalty double the duty and only in the exceptional circumstances for special reasons, the harsher and extreme step to levy penalty not more than 10 times to be invoked. Moreover, provisions of Sections 34 and 39 of Act gave distinction to Court and Authority to levy penalty of Rs.5 apart from

¹ Not good law as held in Digambar Warty case

collecting deficit stamp duty or in alternative could levy penalty not more than ten times in appropriate cases - Thus, penalty of ten times levied by trial Court was set aside and penalty of Rs.5 was levied instead of ten times duty

M.S. Mahadevaiah vs. Akkamma and Ors.:
MANU/KA/ 1928/2015 - Section 37 of Karnataka Stamp Act speaks about the manner in which the impounded document has to be dealt with by the authority who has got power to receive it as evidence. As per Section 37 of Karnataka Stamp Act, the court is expected to assess the deficit court fee payable on the document and penalty. After collecting one time deficit stamp duty and 10 times penalty as provided in Section 34 of the Karnataka Stamp Act, the court will have to send a copy of the authenticated document together with an endorsement that duty and penalty levied thereon has been recovered. Sub section 2 of Section 37 of Karnataka Stamp Act mandates that if the assessed duty and penalty is not paid by the party who has produced the document, such impounded original document will have to be sent to the Deputy Commissioner and the Deputy Commissioner can collect the same as arrears of Land Revenue.

In State of Bihar v. Karam Chand Thapar and Brothers Ltd. MANU/SC/0002/1961 : [1962] 1 SCR 827 , the Apex Court observed that under Section 35

of the Stamp Act there can be validation only of the original, when it is unstamped or insufficiently stamped. It is now well settled that the copy of an instrument cannot be validated.

UN REGISTERED DOCUMENT AND ITS PURPOSE IN LAW

The Supreme Court upon consideration of some of the judgements, on interpretation of term "collateral purpose in the proviso to Section 49 of the Registration Act, 1908", has in **K.B. Saha & Sons (P) Ltd. vs. Development Consultant Ltd.- MANU/SC/7679/2008 : (2008) 8 SCC 564** at para 34 of the report, culled out following principles:- (and the same was reiterated in *S. Kalavathi v. V.R. Somasundaram* MANU/SC/0246/2010 : (2010) 5 SCC 401)

"1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or

interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

6. The document required to be registered if unregistered can be admitted in evidence as evidence by a contract in a suit for specific performance"

WHO SHOULD GIVE EVIDENCE IN REGARD TO MATTERS INVOLVING PERSONAL KNOWLEDGE?

Man Kaur v. Hartar Singh Sangha, (2010) 10 SCC 512 In this case, the apex court has further elaborated the circumstances, in which a power of attorney would or would not be competent to tender evidence on behalf of the principal and has summarized the legal position thus : "18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of

attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those

different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

BANK WITHOUT ASCERTAINING TITLE OF MORTGAGOR SANCTIONING OF LOAN IS BAD

**Punjab National Bank vs. G.R. Developers and Ors.:
MANU/KA/7710/2019**

The present case, entire by revolves upon only Ex. P.1- Lease Deed and Ex. P.13 -Lease and Development

Agreement between the plaintiff and 1st defendant. The 1st defendant has misused the Lease Deed and approached the 3rd defendant - Bank for loan. The 3rd defendant - Bank, without ascertaining the title of the 1st defendant in respect of the property in question, only on the basis of the Lease Deed and Lease and Development Agreement as per Exs. P.1 and P. 13, proceeded to sanction loan based on lease hold rights which is impermissible, in view of the provisions of Section 108(g) of the Transfer of Property Act.

NO ONE CAN BESTOW OR GRANT A GREATER RIGHT, OR A BETTER TITLE THAN HE HAS HIMSELF

State of Andhra Pradesh and Others -vs- Star Bone Mill and Fertiliser Company reported in MANU/SC/0190/2013 : (2013)9 SCC 319 Section

90 of the Evidence Act is based on the legal maxims: nemo dat qui non habet (no one gives what he has not got); and nemo plus juris tribuit quam ipse habet (no one can bestow or grant a greater right, or a better title than he has himself). This section does away with the strict rules, as regards the requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The principle enshrined in Section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of

peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of Code of Criminal Procedure, 1973, and Sections 154 and 158 of Indian Penal Code, 1860, were enacted. All the aforesaid provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the Plaintiff is not prima facie wrongful, and title of the Plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It infact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment etc. Where the apparent title is with the Plaintiffs, it is incumbent upon the Defendant, that in order to displace this claim of

apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act. The courts below have failed to appreciate that mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there may not be estoppel against the statute. Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property.

C.R. Ramachandra Gowder v. C.P. Nanjappa , AIR 1973 Mad 179 wherein it was held, "The mere fact that the property stood in the name of one of the partners and that it was not shown in the balance-sheet as partnership property will not alter its character as a partnership property when it was reconstructed with the partnership fund and the other partners was staying there for conducting the partnership business."

In the case of Addanki Narayanappa v. Bhaskara Krishnappa (dead). AIR 1966 SC 1300, 1966 SCR (3) 400, it was held, "The provisions of Sections 14, 15, 29, 32,37 and 48 of the Partnership Act, 1932, make it clear that whatever may be the character of

the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership, it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own."

Hon'ble Apex Court in S.V.Chandra Pandian V. S.V.Sivalinga Nadar, reported in (1993) 1 SCC 589,

held as follows : "16. From the foregoing discussion it seems clear to us that regardless of its character the property brought into stock of the firm or acquired by the firm during its subsistence for the purposes and in the course of the business of the firm shall constitute the property of the firm unless the contract between the partners provides otherwise. On the dissolution of the firm each partner becomes entitled to his share in the profits, if any, after the accounts are settled in accordance with Section 48 of the Partnership Act. Thus in the entire asset of the firm all the partners have an interest albeit in proportion to their share and the residue, if any, after the

settlement of accounts on dissolution would have to be divided among the partners in the same proportion in which they were entitled to a share in the profit. Thus during the subsistence of the partnership a partner would be entitled to a share in the profits and after its dissolution to a share in the residue, if any, on settlement of accounts. The mode of settlement of accounts set out in Section 48 clearly indicates that the partnership asset in its entirety must be converted into money and from the pool the disbursement has to be made as set out in clause (a) and sub-clauses (i), (ii) and (iii) of clause (b) and thereafter if there is any residue that has to be divided among the partners in the proportions in which they were entitled to a share in the profits of the firm. So viewed, it becomes obvious that the residue would in the eye of law be moveable property i.e. cash, and hence distribution of the residue among the partners in proportion to their shares in the profits would not attract Section 17 of the Registration Act. Viewed from another angle it must be realized that since a partnership is not a legal entity but is only a compendious name each and every partner has a beneficial interest in the property of the firm even though he cannot lay a claim on any earmarked portion thereof as the same cannot be predicated. Therefore, when any property is allocated to him from the residue it cannot be said that he had only a definite limited interest in that property and that there is a transfer of the remaining interest in his favour within the meaning of Section 17 of the

Registration Act. Each and every partner of a firm has an undefined interest in each and every property of the firm and it is not possible to say unless the accounts are settled and the residue of surplus determined what would be the extent of the interest of each partner in the property. It is, however, clear that since no partner can claim a definite or earmarked interest in one or all of the properties of the firm because the interest is a fluctuating one depending on various factors, such as, the losses incurred by the firm, the advances made by the partners as distinguished from the capital brought in the firm, etc, it cannot be said, unless the accounts are settled in the manner indicated by Section 48 of the partnership Act, what would be the residue which would ultimately be allocable to the partners. In that residue, which becomes divisible among the partners, every partner has an interest and when a particular property is allocated to a partner in proportion to his share in the profits of the firm, there is no partition or transfer taking place nor is there any extinguishment of interest of other partners in the allocated property in the sense of a transfer or extinguishment of interest under Section 17 of the Registration Act. Therefore, viewed from this angle also it seems clear to us that when a dissolution of the partnership takes place and the residue is distributed among the partners after settlement of accounts there is no partition, transfer or extinguishment of interest attracting Section 17 of the Registration Act.”

In order to prove that it is the property of the firm, the following factors may be taken into consideration:

- (a) Whether the property was acquired for partnership purpose in the course of the business of the firm;
- (b) Whether it was purchased with the assets of the firm;
- (c) Whether it was acquired by or for the firm;
- (d) Whether it was put to the use of the firm and treated as the property of the firm;
- (e) Whether it was entered and carried on in the books of the firm as the property of the firm; and
- (f) Whether it had been shown in the partnership stock.

The ultimate test determining whether the property is the partnership property is the intention of the parties or the agreement between the partners. That in the absence of any agreement between the parties, we have to see:

- (1) The source whence the property was obtained;
- (2) The purpose for which it was acquired; and
- (3) The mode in which it has been dealt with.

POSSESSION AND TITLE

In Gurunath Manohar Pavaskar and Ors. v. Nagesh Siddappa Navalgund and Ors.
MANU/SC/8191/2007 : AIR 2008 SC 901, Court held as under: A revenue record is not a document of

title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act.

In Nair Service Society Ltd. v. K.C. Alexander and Ors. MANU/SC/0144/1968 : AIR 1968 SC 1165, dealing with the provisions of Section 110 of the Evidence Act, this Court held as under: Possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides.

In Chief Conservator of Forests, Govt. of A.P. v. Collector and Ors. MANU/SC/0153/2003 : AIR 2003 SC 1805, this Court held that: Presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title.

TERMS OF REGISTERED DOCUMENT CANNOT BE VARIED

Terms of the registered sale deed as regards consideration will not be obliterated just because by mutual agreement the parties had agreed at some other consideration amount. In terms of sections 91/92 of Evidence Act, plaintiff cannot argue that the consideration of the sale for the flat was actually

intended to be something else and not what was actually recorded in the registered sale deed.

In Om Prakash v. IOCL Officers Welfare Society & Anr., 2019 SCC OnLine Del 6719 CS(OS) No.590/2016 - Delhi High Court - 11-01-2019 - a suit for recovery of balance sale consideration under the sale deed, in the face of the sale deed recording that the entire agreed sale consideration had been paid, was rejected as it was barred by sections 91 and 92, Evidence Act.

In Jai Bhagwan v. Rajesh, 2008 Indlaw Del 419, CS(OS) No.714/2008 - Delhi High Court - 05-05-2008 - a suit seeking cancellation of registered sale deeds in favour of defendants on the plea that the entire sale consideration was not received and that the sale deed was got executed for more land than intended to be conveyed by taking advantage of plaintiff's illiteracy was dismissed. It was observed therein that a bare allegation that the plaintiff had not received the full consideration or that the plaintiff had signed the document without reading the contents thereof is no ground for cancellation; if the plaintiff chooses not to read the document, he does so at his own peril.

In Mahender Kehar v. Skyland Builders Pvt. Ltd., 2019 SCC OnLine Del 7940 CS(OS) No.175/2019 - Delhi High Court - 29-03-2019 plaintiff, inter alia,

took the plea that the sale deed was not meant to be acted upon till disputes were settled and that consideration recorded in the sale deed to have been paid was not in fact paid. These pleas of the plaintiff were turned down as they were barred by sections 91 and 92, Evidence Act.

In Tara Sikand Atwal Vs. Viraj Sikand & Ors. 2019 SCC OnLine Del 8185 - CS(OS) No.444/2018 - 10-04-2019 - Delhi High Court - plaintiff sought cancellation of registered relinquishment deed that had been executed out of love and affection. Her plea was that there was actually an understanding and a separate agreement that for execution of the relinquishment deed she would be paid some money. This plea was turned down as being barred by sections 91 and 92, Evidence Act.

Kamalamma vs Ramabhadra Gupta - ILR 1988 KAR 20 (DB) No doubt, the endorsement made by the Sub Registrar under Sub-section (1) (c) of Section 58 read with Section 59 and Section 60(2) of the Registration Act, is prima facie evidence of payment of the amount mentioned therein. But it is not a conclusive evidence of receipt of consideration. It is merely prima facie evidence of the fact. The certificate by itself is admissible and no proof is necessary, to prove the said fact. Even the Sub Registrar need not be examined- to prove the genuineness of the certificate. The endorsement made as per Section 58(1) of the

Registration Act by Registering Officer affixing the date and his signature as per Section 59 thereof on a document endorsed as "registered" is admissible under sub--section (2) of Section 60 of the Registration Act for the purpose of proving that the facts mentioned in the endorsement have occurred as mentioned therein. Such endorsement can straight away be admitted and the genuineness of which is to be presumed under Section 79 of the Evidence Act. But nevertheless it is not conclusive proof. It is open to the party challenging it to lead evidence to contradict it and prove that what is stated in the certificate is not correct. That it is not conclusive is also further demonstrated by the proviso to Sub-section (1) of Section 92 of the Evidence Act which enables the parties to adduce oral evidence to show that there is failure of full or partial payment of the amount mentioned in the document.

In New India Assurance Company Ltd. v. Kusumanchi Kameshwara Rao and Anr. : (1997) 9 SCC 179 , it is stated: ...It is obvious that when such guarantee bonds are reduced to writing the express terms of this writing containing the guarantee bond would be the repository of the obligations of the guarantor flowing from the surety bond. As per Sections 91 and 92 of the Indian Evidence Act, 1872 no evidence dehors the terms of the agreement, whether documentary or oral, can be led by the parties to get out of the express terms thereof. Whether the

express terms of the guarantee bond give rise to the contract of guarantee sought to be enforced will be the only limited enquiry which could be gone into by the courts while deciding the rights and obligations flowing from such contract of guarantee which is a tripartite contract between the creditor, principal debtor and the surety. Once such suretyship agreement is established on the clear terms of the bond then as laid down by the aforesaid decisions of this Court no latitude can be given to the contracting party, namely, the surety or even the principal debtor to enable them to get out of the obligations of the suretyship agreement flowing from such contract, except in exceptional circumstances as indicated in these decisions.

In State Bank of India v. Mula Sahakari Sakhar Karkhana Ltd., (2006) 6 SCC 293, it was observed :

“22. A document, as is well known, must primarily be construed on the basis of the terms and conditions contained therein. It is also trite that while construing a document the court shall not supply any words which the author thereof did not use.”

Supreme Court in the case of Raj Kumar Rajindra Singh v. State of Himachal Pradesh and others (AIR 1990 SC 1833) "17. To put it differently, if the terms of the document are clear and unambiguous, extrinsic evidence to ascertain the true intention of the parties is inadmissible because Section 92 mandates

that in such a case the intention must be gathered from the language employed in the document. But if the language employed is ambiguous and admits of a variety of meanings, it is settled law that the 6th proviso to the section can be invoked which permits tendering of extrinsic evidence as to acts, conduct and surrounding circumstances to enable the Court to ascertain the real intention of the parties. In such a case such oral evidence may guide the Court in unraveling the true intention of the parties. The object of admissibility of such evidence in such circumstances under the 6th proviso is to assist the Court to get to the real intention of the parties and thereby overcome the difficulty caused by the ambiguity. In such a case the subsequent conduct of the parties furnishes evidence to clear the blurred area and to ascertain the true intention of the author of the document."

LIABILITY BASED ON BOOKS OF ACCOUNTS

Supreme Court in Chandradhar Goswami v. Gauhati Bank, 1967 AIR 816, 1967 SCR (1) 921, as under: "No person can be charged with liability merely on the basis of entries in books of account, even where such books of account are kept in the regular course of business. There has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability thereunder, except where the person to be

charged accepts the correctness of the books of account and does not challenge them. The original entries alone under Section 34 of Evidence Act would not be sufficient to charge any person with liability and as such copies produced under Section 4 of the Bankers' Books Evidence Act obviously cannot charge any person with liability."

Sobha Ltd. v. Niho Construction Ltd. AIR ONLINE

2018 DEL 1973 This Court is of the view that the balance-sheet of the defendant- company amounts to an acknowledgement of debt and the present suit based on admitted MoU, cheques and balance-sheet of the defendant- company is covered under Clause (2)(b)(i) of Rule 1 of Order XXXVII CPC. A Coordinate Bench of this Court in S.C. Gupta Vs. Allied Beverages Co. Pvt. Ltd., 2007 SCC OnLine Del 655 has held as under:- "56. From the foregoing, it is evident that the balance sheets of the defendant company clearly amounted to acknowledgement of debt in the light of the principles laid down in the foregoing judgments. In Daya Chand Uttam Prakash Jain v. Santosh Devi Sharma 67 (1997) DLT 13, this Court has held that 'an acknowledgement' would amount to 'written contract' and that acknowledgement implies present liability with an obligation to pay. Such written acknowledgement satisfies all essential elements of a written contract.

SERVICE OF NOTICE

In K. Bhaskaran v. Sankaran Vaidhyan Balan and another, reported in MANU/SC/0625/1999 : JT 1999 (7) SC 558, the Hon'ble Supreme Court has observed that if a notice required under a statute has been sent and if it has been returned as unclaimed, then giving of notice is complied with. It has also been laid down that where the sender has despatched the notice by post with the correct address written on it, then it can be deemed to have been served on the sendee unless he proves that it was not really served and that he was not responsible for such non-service. Such non-service on the person addressed on the notice has not been challenged. The postal acknowledgment has been produced on record. A second copy of the notice has been served under certificate of posting. The certificate of posting is also on record. The above evidence conclusively leads us to believe that the notice has been duly served upon the petitioner. Therefore, mere denial by the petitioner is insufficient to disprove the service of notice.

Hon'ble Andhra Pradesh High Court in Shanmukhi v. Venkatarami Reddi, AIR 1957 Andhra Pradesh 1 wherein it has been held as follows :

"It is seen that in the case of substituted service, there are two conditions prescribed before it can be resorted to, viz., that the Court must be satisfied either (1) that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or

(2) that for any other reason the summons cannot be served in the ordinary way. The satisfaction of the Court in each of these cases is brought about by representations of the plaintiff usually made by an affidavit. If, of course, the defendant has been deliberately keeping out of the way and substituted service is ordered in such a case, it certainly would be 'due' service. A party cannot close his eyes and complain that he is unable to see. But, if on the other hand the defendant is not really keeping out of the way at all and the Court is only induced to believe that he is, by the one-sided representation of the plaintiff, it is clear that the service that is then substituted cannot be regarded as 'due' service. Therefore, when the question arises as to whether in a particular case, substituted service obtained from the Court is or is not 'due' service, it will have to be determined by ascertaining whether the representations made to the Court by the plaintiff were not true, that is to say, whether the defendant could be presumed in the circumstances, to have or had actual knowledge."

Teharoonchand v. Surajmull Nagarmull, AIR 1984

Calcutta 82, wherein it has been held as follows : "It is true that under the law service of summons under Order 5, Rule 20 of the Code shall be as effectual as if it had been made on the defendant personally. Before issuing summons under Order 5 Rule 20 of the Code, the Court is to be satisfied that the defendant is

keeping out of the way for the purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way. Before such satisfaction, the Court has to consider the case carefully having regard to the nature of the earlier attempts made for the service of summons. Mere assertion of the plaintiff in this respect to attract the provisions of Order 5 Rule 20 of the Code will not be enough. Only when the Court is satisfied from the materials on record that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason summons cannot be served in the ordinary way, the Court will be entitled to order service of summons under Order 5, Rule 20 of the Code."

PRESUMPTION OF SERVICE OF POST OR LETTER

Under Section 27 of the General Clauses Act, there is a presumption of service by registered post, as held by the Hon'ble Supreme Court in Gujarat Electricity Board v. Atmaram Sungomal Poshani, MANU/SC/0200/1989 : AIR 1989 SC 1433; Commissioner of Income Tax (Admn.) v. V.K. Gururaj, MANU/SC/1348/1996 : 1996 (7) SCC 275; State of U.P. v. T.P. Lal Srivastava, MANU/SC/1674/1996 : 1996 (10) SCC 702; Adavala Suthaiah v. Special Deputy Collector, Land Acquisition Unit, MANU/SC/0989/1997 : 1997 (1) SCC 130; and Shimla Development Authority v. Santosh Sharma

(Smt.), MANU/SC/0416/1997 : AIR 1997 SC 1791 : 1997 (2) SCC 637: 1997-I-LLJ-831

In Madan Lal Kadia v. Union of India MANU/OR/0067/1968, the Orissa High Court placed reliance upon the Judgment of Privy Council in Harihar Banerji v. Ramshashi Roy AIR 1918 PC 102 and held that there can also be presumption of receiving the letter sent under postal certificate in view of the provisions of Section 114(f) of the Evidence Act

In Kanaklata Ghosh v. Amal Kumar Ghosh MANU/WB/0061/1970, a similar view has been reiterated by the Calcutta High Court by observing that if a person makes a claim that the letter was sent under postal certificate, the other side may cross-examine it on the said issue and try to find out further information as to who had posted it, at what time it was posted etc.

In Mst. L.M.S. Ummu Saleema v. B.B. Gujaral, MANU/SC/0072/1981, the Apex Court, dealt with the issue of presumption of service of letter sent under postal cover, and observed as under: "6. The certificate of posting might lead to a presumption that a letter addressed to the Assistant Collector of Customs was posted on August 14, 1980 and in due course reached the addressee. But it is only a permissible and not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compel the Court to

draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the Court may refuse to draw the presumption. On the other hand, the presumption may be drawn initially but on a consideration of the evidence, the Court may hold the presumption rebutted."

In Surajmal Shiwbhagwan v. Kalinga Iron Works, AIR 1979 Orissa 126, the Orissa High Court held that the presumption under Section 114 of the Evidence Act, in case of sending the letter under postal certificate, be examined consciously.

In Aylsabeevi v. Aboobackar AIR 1971 Kerala 231, the Kerala High Court held that in such a case, presumption of receipt of the letter under Section 114 of the Evidence Act can be drawn.

DOCUMENT SHOULD BE READ AS A WHOLE FOR ITS INTERPRETATION

Syed Abdulkhader vs Rami Reddy & Ors 1979 AIR 553, 1979 SCC (2) 601 A document will be considered as a whole for interpretation of particular words or directions. An ordinary authority given in one part of the instrument will not be cut down because there are ambiguous and uncertain expressions elsewhere. A power of wide amplitude conferring wide authority cannot by construction be

narrowed down to deny an authority which the donor expressly wanted to confer.

Gurubasappa And Ors. vs Gurulingappa AIR 1962

Mys 246, ILR 1961 KAR 878

In deciding this question, it would be necessary to consider the true scope and effect of sections 91 and 92 of the Evidence Act. Chapter VI of the Evidence Act which begins with section 91 deals with the exclusion of oral evidence by documentary evidence, section 91 of the Act provides: "When the terms of a contract, or a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained". The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is described as best evidence rule. The best evidence about the contents of a document is the document itself and it is the production of the document that is required by section 91 in proof of its contents. In a sense the rule enumerated by section 91 can be said to be an

exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of a document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act. Section 92 of the Evidence Act runs as follows: "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms". It is manifest that section 92 excludes the evidence of oral agreement and it applies to cases where the terms of a contract, grant or other disposition of property have been proved by the production of the relevant documents themselves under section 91 of the Act. In other words, after the document had been produced to prove its terms under section 91, the provisions of section 92 of the Act come into operation for the purposes of excluding the evidence of any oral agreement or the statement for the purpose of contradicting, varying, adding to or subtracting from its terms. It would be noticed that sections 91 and 92 are in effect supplementary to each other. Section 91 would be frustrated without the aid of section 92 and section 92 would be inoperative without the aid of section 91. Since section 92 excludes the admission of oral evidence for the

purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under section 91, it may be said that it makes the proof of the document conclusive of its contents. Like section 91, section 92 can be said to be based on best evidence rule.

Bhinka And Others vs Charan Singh 1959 AIR 960, 1959 SCR Supl. (2) 798 " The Court shall presume to

be genuine every document purporting to be a certificate..... which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer -of the Central Government or of a State Government..... Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper ". Under this section a Court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document. But such a presumption is permissible only if the, certified copy is substantially in the form and purported to be executed in the manner provided by law in that behalf.

C.H. Shah vs S.S. Malpathak And Ors. AIR 1973

Bom 14, Section 79 only raises a rebuttable presumption with regard to the genuineness of certified copies and that too only if they are executed substantially in the form and in the manner provided by law.Section 79, as laid down by the Supreme Court in Bhinka's case already referred to above it must be shown that the certified copy was executed substantially in the form and in the manner provided by law. There would, therefore, be a check or safeguard in so far as the officer certifying it in the manner required by law would have to satisfy himself in regard to the authenticity of the original and in regard to the accuracy of the copy which he certifies to be a true copy thereof. On the other hand if the original of a public document is to be admitted in evidence without proof of its genuineness, there would be no check whatever either by way of scrutiny or examination of that document by an officer or by the Court.

In Delta International Limited v. Shyam Sundar

Ganeriwalla & Anr., AIR 1999 SC 2607, Court held that the intention of the parties is to be gathered from the document itself. Intention must primarily be gathered from the meaning of the words used in the document, except where it is alleged and proved that the document itself is a camouflage. If the terms of the document are not clear, the surrounding circumstances and the conduct of the parties have

also to be borne in mind for the purpose of ascertaining the real relationship between the parties. If a dispute arises between the very parties to the written instrument, then intention of the parties must be gathered from the document by reading the same as a whole.

In Vodafone International Holdings B.V v. Union of India & Anr., (2012) 6 SCC 613, while dealing with a similar situation, Court held: “The Court must look at a document or a transaction in a context to which it properly belongs to. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so in not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is that series or combination which may be regarded.”

T.L. Nagendra Babu vs Manohar Rao Pawar ILR 2005 KAR 884 Presumption operates in favour of the party relying on a document, provided he must prove that the document is duly executed and authenticated.

In P.S.Ranakrishna Reddy vs. M.K.Bhagyalakshmi and another {2007 (10) SCC 231}, a contention was raised that the transaction was a loan transaction and not an Agreement of Sale. But the said contention was rejected by the Supreme Court on the ground that the document in question was described as an Agreement of Sale; that the Agreement disclosed negotiations between the parties and that no part of the Agreement contained an indication that it was not intended to be acted upon. Therefore in paragraph-13, the Court reiterated the well settled principle that a document must be read in its entirety and that the intention of the parties must be gathered from the document itself. The Court further held that a default clause contained in the document would not make it a contract of loan.

INTERPRETATION OF A DOCUMENT

The principle of interpretation of a document is laid down by the Apex Court in its judgment in the case of Kamla Devi v. Takhatmal and another, reported in AIR 1964 SC 859. The relevant portion contained in para 8 of the said judgment is reproduced below : "8. ... Section 94 of the Evidence Act lays down a rule of

interpretation of the language of a document when it is plain and applies accurately to existing facts. It says that evidence may be given to show that it was not meant to apply to such facts. When a Court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions. Sometimes when it is said that a Court should look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply, accurately to existing facts. But if the words are clear in the context of the surrounding circumstances, the Court cannot rely on them to attribute to the author an intention contrary to the plain meaning of the words used in the document. ..."

**THE BURDEN OF PROOF IS HEAVY ON A PERSON
QUESTIONING THE SALE DEED AND CLAIMING
THE SAME TO BE NOMINAL**

In Vimal Chand Ghevarchand Jain V. Ramakant Eknath Jajoo (2009(2) CTC 858), the Supreme Court

had held as follows: The burden of proof is heavy on a person questioning the sale deed and claiming the same to be nominal. He should adduce proper extrinsic evidence to establish his case. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance. The deed of sale was a registered one. It, therefore, carries a presumption that the transaction was a genuine one. The pleadings were required to be considered provided any evidence in support thereof had been adduced. No cogent evidence had been adduced by the respondent to show that the deed of sale was a sham transaction and/or the same was executed by way of a security. The deed of sale being a registered one and apparently containing stipulations of transfer of right, title and interest by the vendor in favour of the vendee, the onus of proof was upon the defendant to show that the said deed was, in fact, not executed or otherwise does not reflect the true nature of transaction. Evidently, with a view to avoid confrontation in regard to his signature as an attesting witness as also that of his father as vendor in the said sale deed, he did not examine himself. An adverse inference, thus, should have been drawn against him. When a true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible. Therefore, it was open to the respondent to adduce oral evidence in regard to the nature of the document. The document in

question was not only a registered one but also the title deeds in respect of the properties have also been handed over. Symbolical possession if not actual physical possession, thus, must be held to have been handed over. It was acted upon. Appellants started paying rent in respect of the said property. No objection thereto has been raised by the respondent. Pleadings of the parties, it is trite, are required to be read as a whole. Defendants, although are entitled to raise alternative and inconsistent plea but should not be permitted to raise pleas which are mutually destructive of each other. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct. Equally well settled is the principle of law that an admission made by a party in his pleadings is admissible against him *proprio vigore*. Therefore, the deed of sale was required to be construed in proper perspective. Indisputably, the deed of sale contained stipulations as regards passing of the consideration, lawful title of the vendor, full description of the vended property, conveyance of the right, title, interest, use, inheritance, property, possession, benefits, claims and demands at law and in equity of the vendor. A document, must be construed in its entirety. Reading the document in question in its entirety, there cannot be any doubt whatsoever that it was a deed of sale. It satisfies all the requirements of a conveyance of sale as envisaged u/s. 54 of the Transfer of Property Act.

Right of possession over a property is a facet of title. As soon as a deed of sale is registered, the title passes to the vendee. The vendor, in terms of the stipulations made in the deed of sale, is bound to deliver possession of the property sold. If he does not do so, he makes him liable for damages. The indemnity clause should have been construed keeping in view that legal principle in mind. The stipulation with regard to payment of compensation in the event appellants are dispossessed was by way of an indemnity and did not affect the real nature of transaction. In any event, the said stipulation could not have been read in isolation. Such a case had never been made out and hence cannot be allowed to be raised for the first time before this court. In any event, in view of the conduct of the respondent, he cannot claim equity. An equitable relief can be prayed for by a party who approaches the court with clean hands.

SOME BRIEF CITATION POINTS ON DOCUMENTS

- Non mentioning of survey number will not render the mother document void so also the area of the subject matter. Mithukhan case: AIR 1986 MP 39.
- If the language employed has ambiguities to enter into it, then intention of the parties has to be gathered by overall survey of the contents of the

document in question. P.L.Bapuswami case: AIR 1966 SC 902.

□ If a document is relatively 30 years old and was obtained from proper custody, then its contents have to be presumed genuine. Smt Anika B. case: AIR 2005 MP 64.

□ Just by name true nature of document cannot be disguised nor be treated otherwise. AIR 1958 SC 532.

□ For clear identification of any immoveable property, the deed should be very clear about the schedule or boundaries of the property. If the boundaries are disputed, their description resolves the dispute. M. Dhondusa Religious and Charitable Trust case: ILR 2002 Kar 4832.

□ If one interpretation could give effect to all parts of the deed and other renders some clauses nugatory, then, the interpretation that gives effect to all clauses should be preferred. Radha Sundar Dutta case: AIR 1959 SC 24. D.D.A. case: AIR 1973 SC 2609.

□ In case of contradictions in statements of document about area and boundaries the boundaries shall prevail. M/S Roy &co case: AIR 1979 Cal 50.

- In case of contradictions between the map and mother deed, the mother deed should prevail. Narain Prasad Singh case: AIR 1983 Pat 244.
- In case of ambiguity with regard to description of property, description as can be ascertained from the boundaries will settle the issue. Babji Dehuri case: AIR 1996 Ori 183.
- In case of contradictions between description and boundaries regarding location of the property, the boundaries shall prevail. Tranglaobi pisciculture co-op soc ltd case: AIR 1969 Mani 84.
- Plan appended to a document forms part of that document. If a plan is so appended, extent cannot be determined solely based on measurements ignoring the map. Sumathy Amma case: AIR 1987 Ker 84.
- Ownership of surface of the land confers ownership of every thing beneath the land unless a reservation was made by transferor while transferring the ownership. Raja Anand Brahma Shah case: AIR 1967 SC 1081. Sukhdeo Singh case: AIR 1951 SC 288.
- Unless other wise provided by the recitals, trees standing on the land will also pass along with the

land. DFO sarahan forest division H.P.case: AIR 1968 SC 612.

□ In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. ONGC ltd case: AIR 2003 SC 2629.

□ Where there is a documentary evidence, oral evidence is not entitled to any weight. Murarka Properties (p) ltd AIR 1978 SC 360.

□ While interpreting the document the document in question should be read as a whole. Therefore , if one clause of the document is invalid or otherwise, that one clause itself will not render the whole document invalid. AIR 1956 SC 46.

□ It is common knowledge that laymen do not know nor care about the niceties of drafting. They cannot be expected to possess the expertise of a professional. Therefore, technical rules that are generally applied to the provisions of law and exceptions should not be applied while interpreting such documents or deeds. AIR 1951 SC 293.

□ The cardinal rule of construction is that a document must be read as a whole, each clause being read in relation to the other parts of the document, and an attempt should be made to arrive at an

interpretation which will harmonize and give effect to other clauses thereof. It is not legitimate to pick out an expression torn from its context and try to interpret the document as a whole in the light of that expression. Such a forced construction on the document in question cannot defeat the very object which its executants had in view. *Shri Digambar Jain and others case*: AIR 1970 MP 23(26) [FB].

□ Where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, the later provisions have to be held to be void. *Ramkishorelal case*: AIR 1963 SC 890.

□ It is well settled that general words of release do not mean release of rights other than those put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed. *Rajagopal Pillai and another case* AIR 1975 SC 895.(897).

□ In construing documents usefulness of the precedents is usually of a limited character, after all the courts have to consider the material and relevant terms of the document with which they are concerned and it is on a fair and reasonable construction of the terms that the nature and character of the transaction evidenced by it has to be determined. *Trivenibai case*: AIR 1959 SC 620(622).

□ The obligations in the deed which is in the nature of trust is an obligation which can be specifically enforced. Bai Dosabai Mathurdas Govinddas and others case: AIR 1980 SC 1334.

A PARTY TO AN INSTRUMENT CANNOT BE A VALID ATTESTING WITNESS TO THE SAID INSTRUMENT

Laxmibai (Dead) Thru Lrs. & Anr. vs Bhagwanthbuva (Dead) Thru Lrs 2013 (2) JT 362 = 2013 (2) SCALE 106 A party to an instrument cannot be a valid attesting witness to the said instrument, for the reason, that such party cannot attest its own signature. (Vide: Kumar Harish Chandra Singh Deo & Anr. v. Bansidhar Mohanty & Ors., AIR 1965 SC 1738). ... A document must be construed, taking into consideration the real intention of the parties. The substance, and not the form of a document, must be seen in order to determine its real purport.

WHEN SOURCE OF TITLE IS NOT DISCLOSED – MERE STATEMENT WITHOUT PROOF OF DOCUMENT AS TO SOURCE OF TITLE IS NOT RELEVANT

Prabhakar Adsule vs State Of M.P. & Anr 2004 AIR 3557 = 2004 (11) SCC 249 In the plaint the source of Somaji's title was not disclosed and it was merely

stated that he was owner of the disputed land and the same was coming in his possession since 1918. In his statement in Court, the plaintiff came out with a case that the land had been given by way of grant. However, the plaintiff did not lead any kind of evidence to prove the factum of grant. No document was produced to show that the land had been given by way of grant either to Somaji or to his ancestors.

Bench: N Kumar in M.A. Sreenivasan vs H.V. Gowthama And Anr. ILR 2005 KAR 1138 Therefore the law on the point is well settled. The probate Court will not go into question of title of the property which is bequeathed under the will. It is totally outside the scope of enquiry in a probate proceedings. If the testator has a right in the property the beneficiary gets that right on the death of the testator under the will. Grant of probate do not divest any person of his title to the property nor vest title in the beneficiary under the Will. The scope of enquiry in a probate proceedings is only to find out whether the will sought to be probated has been duly executed by the testator and is proved in accordance with law and the statutory requirements under the Act have been complied with. Therefore grant of probate in no way affects the right of the person who claims title to the property independently or adverse to the interest of the testator. It does not decide any question of title or the existence of the property itself.

Hon'ble Supreme Court as reported in Chandradhar Goswami & Ors. v. The Gauhati Bank Ltd., ,... 1967 AIR 816, 1967 SCR (1) 921" Section

4 of the Bankers' Books Evidence Act (18 of 1891) certainly gives a special privilege to banks and allows certified copies of their accounts to be produced by them and those certified copies become prima facie evidence of the existence of the original entries in the accounts and are admitted as evidence of matters, transactions, and accounts therein. But such admission is only where and to the extent as the original entry itself would be admissible by law and not further or otherwise. Original entries alone under S.34 of the Evidence Act would not be sufficient to charge any person with liability and as such, copies produced under s.4 of the Bankers' Books Evidence Act could not charge any person with liability.

Original entries alone under s. 34 of the Evidence Act would not be sufficient to charge any person with liability and as such copies produced under s. 4 of the Bankers' Books Evidence Act obviously cannot charge any person with liability. Therefore, where the entries are not admitted it is the duty of the bank if it relies on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence. But no person can be charged with liability on the basis of mere entries whether the entries

produced are the original entries or copies under s. 4 of the Banker's Books Evidence Act. "

In Zenna Sorabji and others Vs. Mirabelle Hotel Co.(Pvt.) Ltd. and others, AIR 1981 Bom 446 , "In order that a document could be relied upon as a book of account, it must have the characteristic of being fool-proof. A bundle of sheets detachable and replaceable at a moment's pleasure can hardly be characterised as a book of account. Moreover what Section 34 demands is a book of account regularly maintained in the course of business. A ledger by itself could not be a book of account of the character contemplated by Section 34."

Hon'ble Supreme Court in Ramji Dayawala & Sons (P) Ltd. v. Invest Import, 1981 AIR 2085, 1981 SCR (1) 899, "Undoubtedly, mere proof of the handwriting of a document would not tantamount to a proof of all the contents or the facts stated in the document, if the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those

persons who can vouchsafe for the truth of the facts in issue."

A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, AIR 2004 SC 4794; Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors., AIR 2005 SC 286).

In DLF Universal Ltd. & Anr. v. Director, T. and C. Planning Department Haryana & Ors., AIR 2011 SC 1463, court held:

“It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties’ private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. As is stated in Anson's Law of Contract, “a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept...Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large.” The Court assumes “that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency...In a contract between the joint intent of the parties and the intent of the reasonable person, joint

intent trumps, and the Judge should interpret the contract accordingly.”

The phrase, “as is-where-is”, has been explained by Court in Punjab Urban Planning & Development Authority & Ors. v. Raghu Nath Gupta & Ors., **(2012) 8 SCC 197**, holding as under: “We notice that the respondents had accepted the commercial plots with open eyes, subject to the abovementioned conditions. Evidently, the commercial plots were allotted on “as-is-where-is” basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on “as-is- where-is” basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on “as-is-where- is” basis, they should not have accepted the allotment and after having accepted the allotment on “as-is-where-is” basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the plots were allotted...”

OBJECTS OF CROSS EXAMINATION

A Constitution Bench of Supreme Court in Kartar Singh v. State of Punjab, MANU/SC/1597/1994 : (1994) 3 SCC 569, holds, "278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:

- (1) to destroy or weaken the evidentiary value of the witness of his adversary;
- (2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;
- (3) to show that the witness is unworthy of belief by impeaching the credit of the said witness; and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."

In Juwarsingh v. State of M.P., MANU/SC/0137/1980 : (1980) Supp1 SCC 417, Supreme Court holds, "5....Cross-examination is not the only method of discrediting a witness. If the oral testimony of certain witnesses is contrary to proved facts their evidence might well be discarded on that ground. If their testimony is on the face of it unacceptable. Courts are not bound to accept their

testimony merely because there was no cross-examination."

MODE OF PROOF

Apex Court in Dr. N.G. Dastane v. Mrs. S. Dastane : MANU/SC/0330/1975 : (1975) 2 SCC 326 at para 24 held: 24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice

which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue"; Per Dixon, J, in *Wright v. Wright* (1948) 77 CLR 191, 210 or as said by Lord Denning, " the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear.": *Biyth v. Bivth*, (1966) 1 AER 524, 536. But whether the issue is one of cruelty or of a loan on pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged.

Court in Ghurahu Vs. Sheo Ratan, MANU/UP/0117/1981 : AIR 1981 All 3 and Supreme Court in Union of India v. Ibrahim Uddin, MANU/SC/0561/2012 : (2012) 8 SCC 148, held that presumption under Section 90 of the Evidence Act, 1872 in respect of 30 years old document coming from proper custody relates to the signature, execution and attestation of a document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. That

the contents of the document are true or it had been acted upon, have to be proved like any other fact.

Supreme Court in Birad Mal Singhvi Vs. Anand Purohit, MANU/SC/0052/1988 : AIR 1988 SC 1796, Ravinder Singh Gorkhi Vs. State of U.P., MANU/SC/8161/2006 : AIR 2006 SC 2157, Babloo Pasi Vs. State of Jharkhand, MANU/SC/8099/2008 : (2008) 13 SCC 133 and Madan Mohan Singh Vs. Rajni Kant, MANU/SC/0596/2010 : AIR 2010 SC 2933, held that public documents, though admissible in evidence, have no probative value unless their contents are proved by corroborative evidence.

Supreme Court in Dolgovinda Paricha Vs. Nimai Charan Mishra, MANU/SC/0188/1959 : AIR 1959 SC 914 and State of Bihar Vs. Radha Krishna Singh, MANU/SC/0303/1983 : AIR 1983 SC 684, held that genealogy of the family is not proved only on the basis of statement of interested witness. Orders of Additional Commissioner and Board of Revenue, U.P. are illegal and liable to be set aside.

Supreme Court in State of Bihar v. Radha Krishna Singh, MANU/SC/0303/1983 : AIR 1983 SC 684, held that before, however, opening this chapter it may be necessary to restate the norms and the principles governing the proof of a pedigree by oral evidence in the light of which the said evidence would have to be examined by us. It is true that in considering the oral

evidence regarding a pedigree a purely mathematical approach cannot be made because where a long line of descent has to be proved spreading over a century, it is obvious that the witnesses who are examined to depose to the genealogy would have to depend on their special means of knowledge which may have come to them through their ancestors but, at the same time, there is a great risk and a serious danger involved in relying solely on the evidence of witnesses given from pure memory because the witnesses who are interested normally have a tendency to draw more from their imagination or turn and twist the facts which they may have heard from their ancestors in order to help the parties for whom they are deposing. The court must, therefore safeguard that the evidence of such witnesses may not be accepted as is based purely on imagination or an imaginary or illusory source of information rather than special means of knowledge as required by law. The oral testimony of the witnesses on this matter is bound to be hearsay and their evidence is admissible as an exception to the general rule where hearsay evidence is not admissible. This is culled out from the law contained in clause (5) of Section 32 of the Evidence Act which must be construed to the letter and to the spirit in which it was passed.

In order to appreciate the evidence of such witnesses, the following principles should be kept in mind:

"(1) The relationship or the connection however close it may be, which the witness bears to the persons whose pedigree is sought to be deposed by him.

(2) The nature and character of the special means of knowledge through which the witness has come to know about the pedigree.

(3) The interested nature of the witness concerned.

(4) The precaution which must be taken to rule out any false statement made by the witness post litem motam or one which is derived not by means of special knowledge but purely from his imagination, and

(5) The evidence of the witness must be substantially corroborated as far as time and memory admit."

Supreme Court in State of Bihar v. Radha Krishna Singh, MANU/SC/0303/1983 : AIR 1983 SC 684, further held that Section 35 of the Evidence Act which requires the following conditions to be fulfilled before a document can be admissible -

"(1) the document must be in the nature of an entry in any public or other official book, register or record,

(2) it must state a fact in issue or a relevant fact,

(3) the entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept."

Supreme Court in Birad Mal Singhvi v. Anand Purohit, MANU/SC/0052/1988 : AIR 1988 SC 1796, held that to render a document admissible

under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.

In Ravinder Singh Gorkhi v. State of U.P., MANU/SC/8161/2006 : AIR 2006 SC 2157, unless specifically provided for, in terms of Section 35 of the Evidence Act, the register maintained in the ordinary course of business by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which, inter alia, such register is kept would be a relevant fact. Section 35, thus, requires the following conditions to be fulfilled before a document is held to be admissible thereunder: (i) it should be in the nature of the entry in any public or official register; (ii) it must state a fact in issue or relevant fact; (iii) entry must be made either by a public servant in the discharge of his official duty, or by any person in performance of a duty specially

enjoined by the law of the country; and (iv) all persons concerned indisputably must have an access thereto.

Supreme Court in B.S.E. Brokers' Forum v. Securities and Exchange Board of India, MANU/SC/0069/2001 : (2001) 3 SCC 482, held that Court will always rely upon Section 114 Ill. (e) of the Evidence Act to draw a statutory presumption that the official acts are regularly performed and if satisfied that the action in question is traceable to a statutory power, the courts will uphold such State action.

In CIDCO v. Vasudha Gorakhnath Mandevlekar, MANU/SC/1014/2009 : (2009) 7 SCC 283, held that the deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent.

BURDEN OF PROOF IN PROMISSORY NOTE LOAN

In Madras High court in the case of **M. Mariappan and Ors. vs. S. Arumugam and Ors.: MANU/TN/7967/2019**, before case is remanded for fresh trial following facts and burden of proof discussed:-

10. The defendants 1 to 3 who are the Appellants herein have categorically disputed the availing of loan from the plaintiff and they have also disputed the execution of any promissory note in favour of the plaintiff as seen from their written statement as well as from their deposition. PW1 who is the plaintiff has deposed that he knew the defendants 1 to 3 only through PW3 who is the witness in the alleged Promissory Note (Ex. A1). PW1, the plaintiff has also deposed that he did not know who had written the Promissory Note and the signature of the witness in the promissory note. PW1 has also admitted that he did not know the date on which he advanced money to the first defendant and he has also admitted that the statement in the promissory note are written in four different inks.

11. The initial burden of proving that the defendants 1 to 3 availed loans and executed a promissory note is on the plaintiff. In the case on hand, the defendants 1 to 3 have categorically denied the execution of the promissory note both in their pleadings as well as in their deposition.

12. This Court also perused and examined the promissory note (Ex. A1). As seen from the promissory note (Ex. A1), the statements in the promissory note are written in four different inks. When the execution of promissory note is doubtful, the initial burden of proving the execution of the promissory note has not been discharged by the plaintiff. The plaintiff ought to have let in evidence as to why the statements in the

promissory note have been written in four different inks. Only in cases where the signature of the borrower in the promissory note is proved, the initial burden of proof is discharged by the plaintiff and shifted to the defendants. But in the case on hand, the initial burden of the plaintiff to prove his case has not been discharged as the execution of the promissory note Ex. A1 is itself doubtful from the evidence available on record.

13. The Trial Court has duly considered the evidence available on record and only thereafter has come to the right conclusion that the plaintiff has not proved his case and consequently dismissed the suit. However, the lower appellate court in the absence of any material evidence has come to the erroneous conclusion that the plaintiff has discharged the initial burden of proof as to the execution of the suit promissory note and passing of consideration for the suit promissory note.

14. The lower appellate court failed to appreciate the vital material contradictions in the deposition of PW1 and PW3. PW2 deposed that the stamp papers were purchased and brought by PW1. PW2 also admitted that the promissory note was written in three inks but PW3 deposed that the stamps papers were purchased and brought by the first defendant. PW3 also deposed that the signature in the promissory note did not tally with the signature put below after that. The lower appellate court erred in concluding that the plaintiff has proved the execution of the promissory note (Ex.

A1) on the ground that DW1 in his chief examination has conceded for a decree to be passed against him. The defendants 1 to 3 who have categorically denied the execution of any promissory note in favour of the plaintiff and have disputed their signature in the promissory note would have never submitted to a decree to be passed against him. It must have been an inadvertent error committed by either the stenographer who recorded the evidence or by the first defendant (DW1). It cannot be construed that DW1 has submitted to a decree being passed against him. The lower appellate court has erroneously relied upon the inadvertent error recorded in the deposition of DW1 and erroneously held that the defendants 1 to 3 are liable to pay the suit claim.

15. The lower appellate court also erred in holding that the defendants 1 to 3 could have taken steps to get an expert opinion to prove that the thumb impression and the signature found in the promissory note are not theirs. As the initial burden of proving the execution of the promissory note (Ex. A1) by the defendants 1 to 3 has not been discharged by the plaintiffs due to the reasons stated above, the lower appellate court ought not to have held that since the defendants 1 to 3 have not taken steps to get an expert opinion as regards thumb impression and signatures found in the promissory note, the claim of the plaintiff has to be accepted.

16. In the promissory note, Ex. A1, the name of the second defendant is mentioned as Indira but her

correct name is Indirani as seen from the cause title to the plaint. The plaintiff also failed to prove that Indira and Indirani are one and the same. The lower appellate court has failed to take into consideration all these factors while reversing the findings of the Trial Court.

17. For the foregoing reasons, the plaintiff has not discharged his initial burden of proving that the defendants 1 to 3 have executed the promissory note for availing the loan of Rs. 12,000/- from him. Therefore, the matter will have to be remitted back to the Trial Court for fresh consideration after giving opportunities to both the parties to let in additional oral and documentary evidence to prove their respective contentions. Even though the power of remand should be sparingly used, the case on hand for the above mentioned reasons is a fit case for remand. The substantial question of law formulated by this Court is answered in favour of the Appellant by holding that the lower appellate court erred in holding that since the defendants 1 to 3 have not take steps to get the expert opinion to prove the thumb impression and signature from the promissory note (Ex. A1), the execution of Promissory Note is proved.

Court in Sundaramoorthy Vs. R. Palanisamy reported in MANU/TN/2369/2008 : 2009 (1) CTC 728, wherein it is held that In a suit for recovery of money on pronote, it is for the plaintiff to establish his

case and that the defendant need not take steps to disprove the plaintiff's case.

Ravindra vs. T. Parameshwara Hegde: 2018 (3)

AKR 747 - MANU/KA/1219/2018 - Section 67 of the Evidence Act speaks about proof of signature and handwriting of a person alleged to have signed or written document produced. According to the said Section, if a document is alleged to have been signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Therefore, when the plaintiff has contended that Ex. P1 was in the handwriting of the defendant, it was incumbent upon him to establish the same specifically when the defendant had categorically denied about he executing the Promissory Note. In that regard, even though Section 68 of the Evidence Act was not applicable in the instant case since the Promissory Note was not legally required to be attested by witness, however, the document at Ex. P1 was shown to have been signed in the presence of two witnesses, who also have subscribed their signature. The plaintiff could have summoned at least either of them to substantiate his case. Thus, firstly, without alleging and deposing in his evidence that the Promissory Note was executed by the defendant, secondly without marking the alleged signature of the defendant in Ex. P1 and particularly without even examining any of the

witnesses in his support, the mere self-serving statement of the plaintiff that the defendant had got written the document at Ex. P1 cannot be taken that the defendant has executed the said document at Ex. P1 admitting its contents therein. A reading of the above Section goes to show that when the dispute is with respect to the handwriting in such a case, the Court as per the second part of Section 73 of the Evidence Act may direct any person present in Court to write any words or figures for the purpose of enabling it to compare the words or figures so written with any words or figures alleged to have been written by such person. Whereas when the dispute is with regard to the signature, it is not always necessary for the Court to direct the presence of person before it and to put his signature in its presence. On the other hand, when the admitted signature of the alleged execution is available before it, then it can make use of the same to compare the same with the disputed signature. The first para to Section 73 makes it very clear that the said comparison of the admitted signature would be with the one which is to be proved, the signature to be proved shall be the disputed signature, in such case, the court must be first made clear as to which is the disputed signature in order to enable the court to notice and to take legal cognizance of the disputed signature. Said disputed signature is required to be identified by any of the witnesses and get it marked.

Ramu Konar vs. Milap: MANU/KA/2531/2016 19.

In a suit based on a promissory note the burden of proving the genuineness of the promissory note is on the plaintiff. The burden of proving that the negotiable instrument is not supported by consideration is thrown on the person denying the same. It is open to a person on whom such a burden is cast to show that the negotiable instrument is not supported by consideration either by adducing independent evidence or by relying upon the evidence led by the plaintiff on that question if it could be shown therefrom that the negotiable instrument was not really supported by consideration.

20. The court while dealing with a case in respect of a negotiable instrument is also entitled to take into consideration the presumptions of fact that may flow from the circumstances of the case as provided by S. 114 Indian Evidence Act.

21. Therefore, when a suit is filed on a promissory note, it is the duty of the court to raise a presumption that the consideration had passed or that there was a proper transfer of consideration.

IN THE ABSENCE OF PLEA NO EVIDENCE ADMISSIBLE

The Apex Court in Prataprai N. Kothari v. John Braganza : MANU/SC/0316/1999 : (1999) 4 SCC

403 held: Reliance was sought to be placed on the additional evidence admitted by the learned Single Judge during the pendency of the appeals to prove that the appellant had title to the property. It is settled law that in the absence of any plea, no evidence is admissible. The Single Judge of the High Court overlooked that when there was no plea or issue on the question of title, no evidence whatever was admissible regarding the same. He acted beyond his jurisdiction in permitting additional evidence to be filed in appeals.

The Apex Court also held in Bondar Singh and Another v. Nihal Singh and Others : MANU/SC/0193/2003 : (2003) 4 SCC 161 observed that: 7. It is settled law that in the absence of a plea no amount of evidence led in relation thereto can be looked into. Therefore, in the absence of a clear plea regarding sub-tenancy (shikmi), the defendants cannot be allowed to build up a case of sub-tenancy (shikmi). Had the defendants taken such a plea it would have found place as an issue in the suit. We have perused the issues framed in the suit. There is no issue on the point.

The principle was reiterated by this Court in Ram Sarup Gupta (dead) by LRs. v. Bishun Narain Inter College MANU/SC/0043/1987 : [1987] 2 SCR 805 : It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be

considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings, parties knew the case and they proceeded to trial on those issue by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

PLEADINGS FORM FOUNDATIONS OF THE CASE

The Apex Court in Vinod Kumar Arora v. Surjit Kaur: MANU/SC/0827/1987 : (1987) 3 SCC 711 held that: Further, the tenant averred in his written statement that the hall was let out for his residential use as well as for running a clinic but took a categorical stand during the enquiry that he had taken the hall on rent only for running his clinic and not for his residential needs as well. The pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings on propound a new and different case. Moreover, having taken up such a stand, the appellant again contended that the lease of the hall was of a composite nature and as such the benefit of the enlarged definition of a non-residential building given in the E.P. Rent Restriction (Chandigarh Amendment) Act, 1982 would ensure to his aid in the case. The appellant cannot so reprobate.

OBJECT OF PLEADINGS

Apex Court in Bechhaj Nahar v. Nilima Mandal & Ors : MANU/SC/8199/2008 : AIR 2009 SC 1103 held that, The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to

the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the pleadings, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no

opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

Apex Court in M/s Ganesh Trading Co., Appellant v. Moji Ram, Respondent : MANU/SC/0018/1978 :

AIR 1978 SC 484 held that: 2. Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take.

PLEADINGS AND FRAMING OF ISSUES

Bechhaj Nahar v. Nilima Mandal & Ors : MANU/SC/8199/2008 : AIR 2009 SC 1103 It is

thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this

should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise.

Court in Nedunuri Kameswaramma v. Sampati Subba Rao MANU/SC/0319/1962 : [1963] 2 SCR 208 : No doubt, no issue was framed, and the one, which was framed, could have been more elaborate, but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion.

Constitution Bench of this Court in Bhagwati Prasad v. Shri Chandramaul MANU/SC/0335/1965 : [1966] 2 SCR 286 : If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily

disentitle a party from relying upon if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matter relating to the title of both parties to the suit was touched, though indirectly or even obscurely in the issues, and evidence has been led about them then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another.

M.C. Suresh vs. B. Srinivas Naik and Ors.:

MANU/KA/0587/2009 - The Apex Court in *Nedunuw Kamesw.Aramma v. Sampatisubba Rao* MANU/SC/0319/1962 : AIR 1963 SC 884, has held that where the parties went to trial fully knowing the rival case and led all the evidence not only in support

of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. A Division Bench of this Court in *Seddegowda v. Siddegowda and Ors.* 1987 (I) KU 62, has held that when a finding has been recorded on appreciation of the evidence lead by the parties, omission to frame the issue does not vitiate the judgment.

BURDEN OF PROOF

Court in Kundan Lal Rallaaram v. Custodian Evacuee Property, Bombay MANU/SC/0422/1961 : AIR (1961) SC 1316 declared the Section 118 of the Act lays down a prescribed special rule of evidence applicable to negotiable instruments. The presumption contemplated thereunder is one of law which obliges the Court to presume, inter alia, that the negotiable instruments or the endorsement was made or endorsed for consideration and the burden of proof of failure of consideration is thrown on the maker of the note or the endorser as the case may be.

This section lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume, inter alia that the negotiable instrument or the endorsement was made or endorsed for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the

note or the endorser, as the case may be. The question is, how the burden can be discharged? The rules of evidence pertaining to burden of proof are embodied in Chapter VII of the Evidence Act. The phrase 'burden of proof' has two meanings - one the burden of proof as a matter of law and pleading and the other the burden of establishing a case, the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party it may comprise circumstantial evidence or presumptions of law or fact. To illustrate how this doctrine works in practice, we may take a suit on a promissory note. Under Section 101 of the Evidence Act, "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist." Therefore, the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved, the rule of presumption laid down in Section 118 of the Negotiable instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff; but as soon as the execution is proved, Section 118 of

the Negotiable Instruments Act imposes a duty on the Court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of proof in the second sense, that is the burden of establishing a case shifts to the defendant. The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and, if he adduced acceptable evidence the burden again shifts to the plaintiff, and so on. The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of fact, for instance those mentioned in Section 114 and other Sections of the Evidence Act. Under Section 114 of the Evidence Act "The Court may presume the existence of any fact which it think likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case." Illustration (g) to that Section shows that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. A plaintiff, who says that he had sold certain goods to the defendant and that a promissory note was executed as consideration for the goods and that he is in possession of the relevant account books to show that he was in possession of the goods sold and that the sale was effected for a particular

consideration, should produce the said account books, for he is in possession of the same and the defendant certainly cannot be expected to produce his documents. In those circumstances, if such a relevant evidence is withheld by the plaintiff, S. 114 enables the Court to draw a presumption to the effect that, if produced, the said accounts would be unfavourable to the plaintiff. This presumption, if raised by a court can under certain circumstances rebut the presumption of law raised under Section 118 of the Negotiable Instruments Act. Briefly stated, the burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. We are not concerned here with irrebuttable presumptions of law.

K.P.O. Maideenkutty Hajee v. Pappu Manjooran and Anr. MANU/SC/0918/1996 : [1996]2SCR227 , this Court declared that when the suit is based on a pronote which is proved to have been executed, Section 118(a) raises a presumption, until the contrary is proved, that the promissory note was made for consideration. Initial presumption raised under the Section becomes unavailable when the plaintiff himself pleads in the plaint different consideration. If the plaintiff pleads that the promissory note is supported by a consideration as is recited in the instrument, the burden is on the defendant to disprove that the promissory note is not supported by

consideration or different consideration, other than the one as cited in the promissory note did pass. If that consideration is not valid in law nor enforceable the court would consider whether the instrument is supported by valid and legally enforceable consideration. The position of law was thus summarised; It would thus be clear that when the suit is based on pronote, and promissory note is proved to have been executed, Section 118(a) raises the presumption, until the contrary is proved, that the promissory note was made for consideration. That initial presumption raised under Section 118(a) becomes unavailable when the plaintiff himself pleads in the plaint different considerations. If he pleads that the promissory note is supported by a consideration as recited in the negotiable instrument and the evidence adduced in support thereof, the burden is on the defendant to disprove that the promissory note is not supported by consideration or different consideration other than one recited in the promissory note did pass, if that consideration is not valid in law nor enforceable in law, the court would consider whether the suit pronote is supported by valid consideration or legally enforceable consideration. Take for instance, a pronote executed for a time barred debt. It is still a valid consideration. The falsity of the plea of the plaintiff also would be a factor to be considered by the Court. The burden of proof is of academic interest when the evidence was adduced by the parties. The court is required to examine the

evidence and consider whether the suit as pleaded in the plaint has been established and the suit requires to be decreed or dismissed.

S. Valayapathy vs. G. Bernardsha Samuel:

MANU/TN/4419/2011 - 16. As per Section 101 of the Indian Evidence Act, the onus to prove rests on the individual, who asserts a certain fact of any right or liability. The burden of proof in law does not depend upon the form of the proposition, but the burden of proving the claim is on the party who asserts it.

17. In this connection, Section 106 of the Indian Evidence Act speaks of burden of proving fact, especially within the knowledge of that person. Though the Appellant/Defendant in the instant case contents that the suit pronote is a fabricated one and at no point of time, he has executed the suit pronote for a sum of Rs.40,000/-in favour of the Respondent/Plaintiff and further has come out with a specific plea that he has borrowed only a sum of Rs.15,000/-from the Respondent/Plaintiff and that he has only executed pronote for Rs.15,000/-, these averments that he has executed a pronote for Rs.15,000/-only in favour of the Respondent/Plaintiff and it is not for the suit pronote, but a different pronote and hence, the present suit filed on the basis of alleged pronote, dated 27.08.2000, executed by the Appellant/Defendant in favour of the Respondent/Plaintiff for Rs.40,000/-, have not been substantiated

by the Appellant/Defendant to the subjective satisfaction of this Court.

In Chidambaram v. P.T. Ponnusamy reported in 1995 (2) LW 719, a suit was instituted for recovery on promissory note. The defendant in his written statement, admitted that he had signed a blank pro-note for an earlier money transaction, 10 years ago and that the plaintiff had filled up the blank pro-note. Before the lower Court, the plaintiff had also contended that the promissory note contained the admitted signature of the defendant. However, he took out an application to summon the expert witness to compare the handwriting in the suit promissory note. Being aggrieved by the dismissal of the same, on the ground that the Court itself can compare the handwriting in the promissory note, a revision petition came to be filed. While confirming the dismissal of the interlocutory application, with reference to the provision under Section 20 of the Negotiable Instruments Act, this Court held that, From a reading of the above section, it is clear that Section 20 of the Negotiable Instruments Act, is itself authority to the holder of inchoate stamped and signed instrument to fill up the blanks and to negotiate the instrument. The instrument may be wholly blank or incomplete in particular and in either case the holder has the authority to make or complete the instrument as a negotiable one.

In P. Talamalai Chety v. Rathinasamy reported in MANU/TN/1411/1997 : 1997 (1) LW 843, the suit was instituted on a promissory note. The defendant submitted that in a printed pro-note over the stamp, he had signed and delivered the blank promissory note in the hands of the plaintiff. The lower Court, relying upon the difference, found in the suit promissory note and with reference to passing of consideration, dismissed the suit. Placing reliance on an earlier decision in *Chidambaram v. P.T. Ponnusamy* reported in 1995 (2) LW 719 and while setting aside the lower Court decree, a learned Single Judge, at Paragraph 4, has held as follows: The defendant having admitted in clear categorical terms both in the written statement and in the evidence that he only signed the promissory note Ex. A1, the suit must have been decreed by the Court below.

In N. Abdul Azeez v. S. Mohamed Hanifa reported in MANU/TN/0001/1997 : AIR 1997 Mad 1, the appellant before this Court was the plaintiff, who had instituted suit for a recovery, on a promissory note. According to him, he got an assignment of the promissory note from another person on payment of consideration provided in the promissory note. As the defendant therein failed to pay the money under the said document, the suit was laid. The first defendant filed a written statement, which was also adopted by the second defendant. Execution of the suit promissory note in favour of the plaintiff's assignor,

was disputed. It was also contended that the second defendant did not receive any consideration from the plaintiffs assignor and therefore, the alleged assignment is not valid. It was also contended that the plaintiff's father had lent money to the second defendant on a registered mortgage and taken the signatures on blank stamped papers from the defendants and that they were under the impression that signatures on the blank papers were required only for the purpose of mortgage. It was further case that without parting with any money, stamped blank papers were misused. The trial Court decreed the suit. On appeal, the appellate Court, though held that the execution of the promissory note was admitted, on the basis of the oral evidence, let in by DW. 2, reversed the decision. When the correctness of the reversal judgment was challenged, considering the evidence on record, in particular, the oral testimony of the assignor, on the promissory note, this Court held that once the execution of promissory note is admitted and proved, under Section 118 of the Negotiable Instruments Act, a legal presumption would arise, that consideration has been passed on, at time of execution of the document.

In N. Srinivasan v. Muthammal reported in MANU/TN/0164/1998 : 1998 (3) LW 638, the defendant denied the execution of the promissory note. During the course of trial and in the midst of examination, the defendant filed a petition under

Order 8 Rule 9 CPC, for filing an additional written statement, contending inter alia that the suit promissory note was a forged document and that therefore, the plaintiff has to prove the validity of the suit promissory note. The plaintiff filed a counter, denying the said contention and further submitted that after the closure of the evidence, allowing the defendant to file an additional written statement, would cause prejudice to him and that the defences open to him would be lost. The trial Court rejected the application for filing additional written statement. When the matter was taken up, by way of revision petition, this Court dismissed the revision and while doing so, considered the effect of presumption under section 118 of the Negotiable Instruments Act, in respect of a promissory note. At Paragraphs 9 and 10, Court held as follows: 9. To appreciate the contentions raised by the counsel, it has be seen that the present suit is on a promissory note in which certain statutory presumptions arise in favour of the plaintiff. Apart from the presumption which is raised under Section 114(C) of the Indian Evidence Act, Section 118 of the Negotiable Instruments Act, 1981 also raises certain statutory presumptions. Under Section 118 of the Negotiable Instruments Act dealing with the presumption as to the Negotiable instruments Act, it is held that until the contrary was proved the presumption would arise in respect of the consideration, as to the date of the execution, as to the time of acceptance and transfer etc. Apart from

Section 118, under Section 20 of the Negotiable Instruments Act, a further presumption is raised in respect of the negotiable instrument signed and delivered by a person either wholly blank or having written thereon, an incomplete negotiable instrument. In the present case, as could be seen from the observation of the learned District Munsif, D.W. 1, has also claimed that he signed on an incomplete and unfilled promissory note. Therefore, in the present case we are dealing with certain statutory presumptions which accrue in favour of the plaintiff.

10. In comparison to the presumption which would arise under Section 114 of the Indian Evidence Act, it is settled law that presumption arising under Section 118 of the Negotiable Instrument Act is statutory and mandatory in character. In *Official Receiver v. Abdul Shakoor* [MANU/SC/0024/1964 : AIR 1965 SC 920], the Supreme Court has held that Section 114 of the Evidence Act was a general provision, but Section 118 of the Negotiable Instruments Act enacted a Special Rule of evidence which would operate between the parties to the instrument. This Court in, *Subbiah v. Alagappan* [AIR 1962 Mad 218], has held as follows:- There is marked contrast between Section 118 of the Negotiable Instruments Act and Section 114 of the Indian Evidence Act. The statutory presumptions under Section 118 of the Negotiable Instruments Act is mandatory while the presumption under Section

114 of the Evidence Act is permissive depending upon the exercise of discretion of the Court.

Therefore, the present case, being a suit on a promissory note the defendant cannot be allowed to deprive the right of the plaintiff to avail the benefit of the statutory presumption by pleading a conflicting stand in contradiction with the stand taken in the original written statement.

In Bharat Barrel and Drum Manufacturing Company v. Amin Chand Payrelal reported in MANU/SC/0123/1999 : 1999 (1) CTC 497 = 1999 (3) LW 237, the Apex Court held as follows: The evidence led by the defendant in that regard was not accepted by any of the Judges dealing with the case as noticed herein earlier. In the absence of disproving the existence of the consideration, the onus of proof of the legal presumption in favour of the plaintiff could not be shifted.

In Soundarammal v. Vasantha reported in MANU/TN/0759/2001 : AIR 2001 Mad 177, suits were filed on promissory notes. The defendant admitted execution of the promissory notes, but denied the receipt of consideration. According to him, loan was borrowed from the plaintiffs father and discharged by another document. However, the defendant executed two other promissory notes, one in favour of plaintiff's father and another, in favour of plaintiff's mother. Later, the plaintiff's father

pressurised the defendant to execute a mortgage deed mortgaging his property for the loan amount of Rs. 40,000/- and promised to return the promissory notes, duly discharged. Though a registered mortgage deed was executed, there was no consideration and it was executed only in discharge of the promissory notes. Even after the execution of the mortgage deed, promissory notes were not returned. It was the further contention of the defendant that due to enmity, suits were filed. The Trial Court dismissed all the suits. The plaintiff preferred three appeals before this Court. One of the points for consideration in all the three appeals was whether the promissory notes in the three suits were true, valid and supported by consideration. On evidence and following the decisions in *Bharat Barrel and Drum Manufacturing Co., v. Amin Chand Payrelal* reported in MANU/SC/0123/1999 : 1999 (3) LW 237 and *Kamala v. K.A. Kunjithapatham* reported in 1999 (3) LW 872, this Court held that all the three promissory notes were true and valid. The decision of this Court in *Kamala's* case (cited *supra*), considered in the above reported decision, is reproduced hereunder: On a reading of the evidence adduced in this case, I do not think that the defendants have adduced a *prima facie* case rebutting the presumption under Section 118 of the Negotiable Instruments Act. The only argument that was advanced before the Courts below seems to be that the defendant was in possession of sufficient funds and there was no necessity for him to execute the suit promissory notes.

A submission was made that the interval between some of the promissory notes is only 20 days, and within such a short time, there was no necessity for the defendant to borrow huge amounts. I am unable to accept this contention of the legal representatives of deceased defendant, when he (i.e., the deceased defendant) himself had admitted the execution of the promissory notes. Merely because the interval between two promissory notes is only few days, that may not be sufficient to hold that the documents are not supported by consideration.

In Mohammed Ali v. Abdul Sinab reported in 2001 (1) CTC 281=2001-2-L.W. 643, a suit was filed for recovery of money, based on a promissory note. The defendant denied the signature in the promissory note, but pleaded that he had signed a blank promissory note and gave it for balance chit amount and despite payment, the promissory note was not returned. Evidence was let in, proving the execution of the promissory note. While considering the nature of presumption and rebuttal thereof, with reference to Sections 101 and 103 of the Evidence Act and Section 118 of the Negotiable Instruments Act, a learned Single Judge of this Court, at Paragraphs 19, 20 and 22, held as follows:

19. From the reading of the above Section, it is clear that Section 20 of the Negotiable Instruments Act is itself authority to the holder of the signed instrument to fill up the blanks and to negotiate the instrument.

Thus, once it is admitted that the defendant has signed in the promissory notes, his liability cannot be denied. These principles have been held in *Chidambaram v. P.T. Ponnuswamy*, 1995 (2) LW 719 and *P. Talamalai Chetty v. Rathinasamy*, MANU/TN/1411/1997 : AIR 1998 Mad. 23.

20. In the light of the above decisions, it becomes obvious that once it is pleaded and proved that these promissory notes have been signed by the defendant on receiving the considerations, the presumption would arise and the same has to be rebutted by the defendant. Even this rebuttal could be given by direct evidence or by bringing on record the preponderance of probabilities also. In the instant case, the presumption has not been rebutted by the defendant even by the preponderance of probabilities. 22. In this situation, I am not inclined to hold that the presumption under Section 118 of the Negotiable Instruments Act had been rebutted.

In T.N. Boopathy v. T.A. Sattu reported in AIR 2002 Mad 177, the respondent therein has filed a suit on a promissory note, executed in favour of his mother. After her death, the defendant contested the suit that he had never borrowed any money and executed any promissory note. He also contended that the promissory note was a forged one. The trial Court dismissed the suit. On appeal, the first appellate Court reversed the decree, which resulted in the

second appeal to this Court. One of the substantial questions of law formulated by this Court for consideration, was whether the Court below was right in reversing the judgment of the trial Court, in throwing the burden of proof, on the appellant, when the respondent himself had not established that the signature in the suit document was that of the appellant. After comparing the signature of the defendant found in Ex. A1, Promissory note with the signature in the original deposition, the lower appellate Court has reversed the said finding, stating that the signature found in Ex. A1 -Promissory note was that of the appellant/ defendant. In the abovesaid circumstances, this Court, at Paragraph 10, held as follows: 10. A perusal of Ex. A1 promissory note would clearly indicate that there was only one attesting witness to the document and admittedly he was the father of the plaintiff and hence much weight cannot be given to the non-examination of the said attesting witness is true that the said document was not sent to the handwriting expert for the purpose of comparison of the signature in Ex. A1 document with the admitted signature of the defendant. The trial Court has stated the same as one of the main reasons for dismissing the suit. But on comparison of Ex. A1 document with the postal acknowledgement, the trial Court has come to the conclusion that the signature found in Ex. A1 document was not that of the defendant. The document in question was not sent to the handwriting expert for the purpose of comparison

and the plaintiff has also not taken steps to do the same. But the suit cannot be dismissed on the said ground alone, is well settled that the Court can compare the disputed signature with the available admitted signature and arrive at a finding. As stated above, the trial Court gave a finding that the signature found in Ex. A1 promissory note was not that of the appellant/defendant, but the first appellate Court has reversed the said finding stating that the signature found in Ex. A1 was that of the appellant/defendant. Under the stated circumstances, the Court thought it fit to compare the disputed signature under Ex. A1 promissory note with the other available admitted signature of the appellant. When the signature found in Ex. A1 promissory note is compared with the signature of the defendant found in his original deposition as DW1, it would clearly reveal that the signature found in Ex. A1 promissory note was that of the appellant/defendant. Thus from the available evidence as discussed above it has to be found that the plaintiff/respondent has proved the execution of the promissory note by the appellant/defendant. Once the respondent/ plaintiff has discharged his burden of proving the same, then it is for the appellant/defendant to prove the non-existence of the consideration found under the promissory note. Once the execution of the promissory note is either admitted or proved, the presumption under Section 118-A of the Negotiable Instrument Act would arise that it is supported by consideration. It is true that such a

presumption is rebuttable. The defendant could prove the failure of consideration. Under such a situation if the defendant discharges the initial onus of proof showing that the existence of consideration was improbable or doubtful "or the same was illegal, the onus would shift to the plaintiff, who would be obliged to prove it as a matter of fact, in the instant case the defendant has thoroughly failed to discharge the initial onus of proof by showing the non-existence of the consideration. The plaintiff must be given the benefit of presumption under Section 118(a) of the Negotiable Instruments Act in his favour. The mere denial of passing of the consideration apparently cannot constitute a valid defence in the instant case, it is not the defence put forth by the appellant that though he executed the document, it was not supported by consideration, but it was also bare denial of his signature and Ex. A1 promissory note was a forged one. From the evidence of PW2 and comparison of the disputed signature as stated above, it has to be found that the signature found in Ex. A1 document was that of the appellant/defendant is has to be pointed out that the appellant was unable to show that Ex. A1 promissory note was not supported by consideration. The court is of the view that it is a fit case where the presumption under Section 118 of the Negotiable instruments Act that when once the signature of the appellant is proved, the presumption that the promissory note was supported by consideration, has to be drawn. There is nothing to

interfere in the judgment of the lower appellate Court, and the second appeal is liable to be dismissed.

In Ganapathy Thevar v. Shanmuga Thevar reported in 2008 (3) CTC 470, the plaintiff filed a suit for recovery of money under the promissory note. The defendant not only admitted his signature, but also contended that he had filled up the amount column in his own handwriting, in respect of a chit transaction and that no amount was borrowed. Both the trial as well as appellate Courts dismissed the suit and appeal respectively. Plea of chit transaction was not proved. Applying Sections 20 and 118 of the Negotiable Instruments Act, this Court, at Paragraphs 18, held that, Section 20 of the Negotiable Instruments Act, would clearly demonstrate that once, the promisser signs the promissory note format, it becomes inchoate document and thereupon, the promise may fill it up and filed a suit. Section 118 of the Act would also come into operation in this case, as the defendant clearly admitted that he received a sum of Rs. 3,600/- (Rupees three thousand and six hundred only) and in consideration of it, he specified the amount at the top of Ex. A.1 and signed beneath the period version."

Mallavarapu Kasivisweswara Rao v. Thadikonda Ramulu Firm reported in MANU/SC/2555/2008 : 2008 (7) SCC 655, the first respondent therein, was a partnership firm. The order respondents were

partners. The individual respondents were appellant's in-laws. The respondents executed two promissory notes, in favour of the appellant. The amount was not repaid and hence, the suit was instituted. Insofar as the first promissory note is concerned, the suit was decreed in favour of the appellant. As regards the second promissory note, the trial Court held that the plaintiff is not entitled to recover the amount, because the first promissory note was not supported by any consideration. The High Court upheld the view of the trial Court. The issue before the Supreme Court was, (i) whether in the absence of any rebuttal by the respondents, to the fact that the suit promissory note was for consideration, as required, which gave rise to the presumption under Section 118 of the Negotiable Instruments Act, the Courts below were justified in holding that since the appellant had given evidence inconsistent with such presumption, no decree could be" passed, on the basis of such presumption.

In K. Sivakami v. S. Krishnan reported in 2008 (6) CTC 271, a suit has been filed for recovery of money on the basis of a promissory note. The defendant admitted execution of the promissory note, but denied passing of consideration. Both the lower Courts decreed the suit and appeal respectively. The defence was that the suit promissory note was executed, as a security for the loan borrowed by the defendant's husband, from Mangalam Finance Chit Corporation at Palani and that there was no consideration on the

promissory note. Both the Courts below observed that though the defendant had contended that the suit promissory note was not executed as a security, the defendant had not sent any notice, calling upon the plaintiff to return the promissory note.

R. Arumugham vs. Natesan: MANU/TN/5320/2011

(i) Section 118 of the Negotiable Instrument Act lays down a special rule of evidence applicable to negotiable instruments.

(ii) The presumption under Section 118 of the Negotiable Instruments Act, is one of law and thereunder a court shall presume, inter alia that the negotiable instrument or the endorsement was made or endorsed for consideration.

(iii) In effect, it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be.

(iv) The burden of proof can be discharged in two means, viz., (1) The burden of proof as a matter of law and pleading; and (2) The burden of establishing a case. The former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant, but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party; it may comprise

circumstantial evidence or presumptions of law or fact.

(v) when the suit is based on promissory note, and that Promissory note is proved to have been executed, section 118 [a] raises a presumption, until the contrary is proved, that the promissory note was made for consideration. That initial presumption raised under section 118 [a] becomes unavailable, when the plaintiff himself pleads in the plaint different considerations. If he pleads that the promissory note is supported by a consideration as recited in the negotiable instrument and that the evidence adduced in support thereof, the burden is on the defendant to disprove that the promissory note is not supported by consideration or different consideration other than one recited in the promissory note. If that consideration is not valid in law nor enforceable in law, the court would consider whether the suit promissory note is supported by a valid consideration or legally enforceable consideration. The falsity of the plea of the plaintiff also would be a factor to be considered by the court.

(vi) Apart from the presumption which is raised under Section 114(C) of the Indian Evidence Act, Section 118 of the Negotiable Instruments Act, 1981 also raises certain statutory presumptions.

(vii) Apart from Section 118, under Section 20 of the Negotiable Instruments Act, a further presumption is raised in respect of the negotiable instrument signed and delivered by a person either wholly blank or

having written thereon, an incomplete negotiable instrument.

(viii) Section 114 of the Evidence Act is a general provision, but Section 118 of the Negotiable Instruments Act enacted a Special Rule of evidence which would operate between the parties to the instrument.

(ix) Section 20 of the Negotiable Instruments Act, is itself an authority to the holder of inchoate stamped and signed instrument to fill up the blanks and to negotiate the instrument.

(x) Once the plaintiff has pleaded and proved the execution of the promissory note, the presumption would be in his favour and that the same has to be rebutted by the defendant by direct evidence or by bringing on record the preponderance of probabilities also.

(xi) the burden initially rests on the plaintiff who has to prove that the promissory note was executed by the defendant. As soon as the execution of the promissory note is proved, the rule of presumption laid down in Section 118 of the Negotiable Instruments Act helps him to shift the burden to the other side. The burden of proof as a question of law rests, therefore, on the plaintiff but as soon as the execution is proved, Section 118 of the Negotiable Instruments Act imposes a duty on the court to raise a presumption in his favour that the said instrument was made for consideration. This presumption shifts the burden of

proof in the second sense, that is, the burden of establishing a case, shifts to the defendant.

(xii) The defendant may adduce direct evidence to prove that the promissory note was not supported by consideration, and, if he adduces acceptable evidence, the burden again shifts to the plaintiff, and so on.

(xiii) The defendant may also rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift again to the plaintiff. He may also rely upon presumptions of fact, for instance those mentioned in Section 114 and other sections of the Evidence Act.

Kalwa Devadattam Versus Union of India: Kamaji Saremal, Firm, reported in MANU/SC/0106/1963 : 1964 AIR (SC) 880, wherein it was held that, "The question of onus probandi is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties."

FAILURE IN TAKING TECHNICAL STEPS TO PROVE ONE MORE OPPORTUNITY GIVEN

S. Senthil Kumar vs. K. Naganathan: MANU/TN/

1824/2012 - 10. No doubt, the learned counsel for the plaintiff would make a supine submission to the effect that the witnesses to the suit were not examined, and even an expert's assistance was not sought for to prove the genuineness of the signature of the deceased-Vasudevan in the suit pronote. The question before this Court is as to whether one more opportunity has to be given.

11. Here, it is a technical procedure which a litigant cannot be expected to know in detail. He should have been advised properly but that was not done so. Because of the inability on the part of the plaintiff to get proper legal advice for examining the attesting witnesses to the suit promissory note and also in taking the assistance of an Handwriting Expert, he should not suffer. Nonetheless, the first Appellate Court correctly held that the attesting witnesses were not examined, yet in the factual circumstances of this case it failed to give one more opportunity to prove the suit pronote and for that matter the plaintiff also did not seek for adducing additional evidence therein.

12. The learned counsel for the defendant would submit that because of the inaction or ignorance of the plaintiff, the defendant should not be made to suffer. No doubt, the misfortune of one should not unnecessarily affect the welfare of another. Hence I would like to point out that ultimately at the time of

disposal of the suit by the Trial Court, the cost shall follow the event throughout.....

14. The plaintiff shall be given due opportunity to examine the attesting witnesses to the suit promissory note; whereupon the defendant shall be given the right to cross-examine all those witnesses and also adduce additional evidence. Over and above that, if the plaintiff so desires, he is at liberty to file an application for taking the assistance of an handwriting expert to compare the disputed signature with that of the admitted ante litem motam signatures and in that event, the Court should be liberal in ordering the assistance of an handwriting expert.

LEAVE TO DEFEND SUIT

Supreme Court in the decision reported as MANU/SC/1490/2016 : (2017) 1 SCC 568 IDBI Trusteeship Services Limited vs. Hubtown Limited, culled out the principles for grant of leave to defend following the decision reported as MANU/SC/0376/1965 : AIR 1965 SC 1698 Milkhiram (India) (P) Ltd. vs. Chamanlal Bros., and laid down as under:-

"17. Accordingly, the principles stated in para 8 of Mechelec Engineers & Manufacturers v. Basic Equipment Corpn. MANU/SC/0043/1976 : (1976) 4 SCC 687 will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in Milkhiram case, as follows:

17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.'

WHEN BEST DOCUMENTARY EVIDENCE NOT PRODUCED ADVERSE INFERENCE TO BE DRAWN

Raghavamma v. Chenchamma MANU/SC/0250/1963 : AIR 1964 SC 136) wherein it has been held as follows: Now coming to the documentary evidence, as we have already indicated, all the relevant documents admitted to have been in existence have not been placed before the Court and an adverse inference has, therefore, to be drawn against the Appellant.

Gopal Krishnaji Ketkar vs. Mahomed Haji Latif and Ors. : MANU/SC/0168/1969 - AIR 1968 SC 1413
Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our

opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

**P. Kumar vs. The State of Tamil Nadu and Ors.:
MANU/TN/3504/2010 - (2011) 2 MLJ 385 -** Thus

the settled position of law is that even the burden of proof does not lie on a party, the Court may draw an adverse inference, if he withholds important documents in his possession which can throw light on the facts at issues. It has to be pointed out that it is not the case of the Defendants that the originals of the zamin records as well as the adangal extracts for the period from 1950 are not available with them. Therefore, when the Defendants, who are the Government authorities have withheld important documents in their possession. which can throw light on the facts at issue, an adverse inference ought to have been drawn under Section 114(g) of the Evidence Act, as is laid down in MANU/SC/0168/1969 : AIR 1968 SC 1413 (referred to supra). The contrary view taken by the lower appellate court and the reasonings assigned by it for not drawing the adverse inference against the Defendants cannot be sustained.

**IN CIVIL CASES EXECUTION OF DOCUMENTS TO
BE INDEPENDENTLY PROVED**

Sri Kalpatharu Financiers vs. V. Natarajan:
MANU/TN/0950/2012 - (2012) 4 MLJ 187 (DB)

Section 80 of the Indian Evidence Act deals with presumption of documents produced as record of evidence. The Section reads as follows: Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any judge or magistrate, or by any such officer as aforesaid, the Court shall presume—that the document is genuine; that the statement is true and that such evidence, statement or confession was duly taken. Though such admissions in the criminal proceedings are admissible in evidence, the execution of promissory note and execution of the documents in civil proceedings, has to be independently proved. ... Once the execution is proved, the presumption under Section 118 of the Act is to be drawn for passing of consideration. Since the respondent has denied the execution of the promissory note and the appellant has proved such execution and the presumption is automatic and moreover, the receipts of the said amount has also been proved. Therefore, the burden shifts on the respondent to prove that he has not executed such documents and has not received the

consideration by rebuttal of evidence. He has failed to discharge his burden.....

50. The suit is on a pronote. Initially the burden is upon the appellant/plaintiff to prove the execution of the pronote. Once the execution is proved or admitted, the passing of consideration is presumed under Section 118 of NI Act but it is a rebuttable presumption. The burden shifts on the respondent to prove that there is no passing of consideration.

51. If the executant of the pronote denies such execution, in other words, if there is a total denial, the burden is upon the holder of the instrument to prove the execution in accordance with law. Execution of any pronote does not require an attesting witness. However, if a witness has signed in the pronote, the holder and the witness can be examined to prove the execution of pronote and passing of consideration.

52. If the executant takes a plea that blank pronotes and papers were obtained from him, on proving the execution of the pronote, the burden shifts on the executant to prove that he had executed only blank papers and there was no passing of consideration.

DIFFERENCE BETWEEN "VOID" AND "ILLEGAL" AGREEMENT:

Hasvantbhai Chhanubhai Dalal vs. Adesinh Mansinh Raval and Ors.: MANU/GJ/0610/2019

The Indian Contract Act, 1872 has made it clear that there is a thin line of difference between void and

illegal agreement. A void agreement is one which may not be prohibited under law, while an illegal agreement is strictly prohibited by law and the parties to the agreement can be penalized for entering into such an agreement. A void agreement has no legal consequences, because it is null from the very beginning. Conversely, the illegal agreement is devoid of any legal effect, since it is started. All illegal agreement are void, but the reverse is not true. If an agreement is illegal, other agreements related to it are said to be void. An agreement that violates any law or whose nature is criminal or is opposed to any public policy or immoral is an illegal agreement. These agreements are void ab initio, and so the agreements collateral to the original agreement are also void. Here the collateral agreement refers to the transaction associated or incidental to the main agreement. The difference between void and illegal agreement can be drawn clearly on the following grounds:

[1] An agreement which loses its legal status is a void agreement. An illegal agreement is one which is not permissible under law.

[2] Certain void agreements are void ab initio while some agreements become void when it loses its legal binding. On the other hand, an Illegal agreement is void since the very beginning. A void agreement is not prohibited by Indian Penal Code (IPC), but IPC strictly prohibits an illegal agreement.

[3] The scope a void contract is comparatively wider than an illegal contract as all agreements which are

void may not necessarily be illegal, but all illegal agreements are void from its inception.

[4] A void agreement is not punishable under law whereas an illegal agreement is considered as an offence, hence the parties to it are punishable and penalised under Indian Penal Code (IPC).

[5] Collateral agreements of a void agreement may or may not be void i.e. they may be valid also. Conversely, collateral agreements of an illegal agreement cannot be enforceable by law as they are void ab initio.

It is quite clear that the void and illegal agreement are very different. One of the factors that make an agreement void is the illegality of the contract, such as contract whose object or consideration is unlawful. Moreover, in both the two agreements loses its enforceability by law.

'Contract' is a bilateral transaction between two or more than two parties. Every contract has to pass through several stages beginning with the stage of negotiation during which the parties discuss and negotiate proposals and counter-proposals as also the consideration resulting finally in the acceptance of the proposals. The proposal when accepted gives rise to an agreement. It is at this stage that the agreement is reduced into writing and a formal document is executed on which parties affixed their signatures or thumb impression so as to be bound by the terms of the agreement set out in that document. Such an agreement has to be lawful as the definition of

contract, as set out in Section 2(h) provides that "an agreement enforceable by law is a contract". Section 2(g) sets out that "an agreement not enforceable by law is said to be void".

Section 10 of the Contract Act provides as under: "10. What agreements are contracts.- All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

The essentials of contract set out in Section 10 above are:

- (1) Free consent of the parties
- (2) Competence of parties to contract
- (3) Lawful consideration
- (4) Lawful object.

NATURE OF A TRANSACTION WOULD BE JUDGED BY THE TERMS AND CONDITIONS TOGETHER WITH THE SURROUNDING AND/OR ATTENDING CIRCUMSTANCES

It is one thing to say that the nature of a transaction would be judged by the terms and conditions together with the surrounding and/or attending circumstances

in a case where the document suffers from some ambiguities but it is another thing to say that the court will take recourse to such a course, although no such ambiguity exists. [See *Bishwanath Prasad Singh v. Rajendra Prasad and Anr.* [(2006) 2 SCALE 699] It is beyond any cavil that a bank guarantee must be construed on its own terms. It is considered to be a separate transaction.

In *New India Assurance Company Ltd. v. Kusumanchi Kameshwara Rao and Another* [(1997) 9 SCC 179], it is stated: "It is obvious that when such guarantee bonds are reduced to writing the express terms of this writing containing the guarantee bond would be the repository of the obligations of the guarantor flowing from the surety bond. As per Sections 91 and 92 of the Indian Evidence Act, 1872 no evidence dehors the terms of the agreement, whether documentary or oral, can be led by the parties to get out of the express terms thereof. Whether the express terms of the guarantee bond give rise to the contract of guarantee sought to be enforced will be the only limited enquiry which could be gone into by the courts while deciding the rights and obligations flowing from such contract of guarantee which is a tripartite contract between the creditor, principal debtor and the surety. Once such suretyship agreement is established on the clear terms of the bond then as laid down by the aforesaid decisions of this Court no latitude can be given to the contracting

party, namely, the surety or even the principal debtor to enable them to get out of the obligations of the suretyship agreement flowing from such contract, except in exceptional circumstances as indicated in these decisions."

In Hindustan Construction Co. Ltd. v. State of Bihar and Others [(1999) 8 SCC 436], the guarantee in question was in the following terms: "We, State Bank of India, incorporated under the State Bank of India Act, 1955, and having one of our branches at Nyayamurti C.N. Vaidya Marg, Fort, Bombay-400 023 (hereinafter referred to as 'the said Bank'), as instructed by the contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, District Singhbhum, Bihar, on his first demand without whatsoever right of objection on our part and without his first claim to the contractor, in the amount not exceeding Rs.10,00,000 (Rupees ten lakhs only) in the event that the obligations expressed in the said clause of the above- mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract"

Daewoo Motors India Ltd. v. Union of India and Others [(2003) 4 SCC 690]. The bank guarantee

involved therein inter alia read as under: "We, Times Bank Ltd., PTI Building, Parliament Street, New Delhi, 110 001 further agree that the demand made by the President of India any money so demanded notwithstanding any dispute raised by M/s Daewoo Motors India Ltd. in any proceeding before any court or tribunal; We, Times Bank Ltd., PTI Building, Parliament Street, New Delhi 110 001 further agree that the demand made by the President of India shall be conclusive as regards the amount due and payable by us under these presents as out of liability under these presents are absolute and unequivocal;"

In Pandit Chunchun Jha v. Sheikh Ebadat Ali & Anr [(1955) 1 SCR 174] Court clearly held: "We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts"

Smt. Indira Kaur & Ors. v. Sheo Lal Kapoor [(1988) 2 SCC 488] therein the court took into consideration the factors adumbrated therein, particularly, a long stipulated period of 10 years for conveying the property and the vendee was prohibited from selling and parting with his right, title and interest for 10 years. The vendor was allowed to occupy the property as a tenant on payment of Rs. 80/- per month. No

order of mutation was passed in his favour. It was held: "6. In the present case having regard to the facts and circumstances highlighted in the course of the discussion pertaining to the question as to whether or not the transaction was a transaction of mortgage having regard to the real intention of the parties it would be difficult to hold that the agreement to sell executed by the defendant in favour of the plaintiff was by way of a "concession". It was a transaction entered into by the defendant who was a hard-headed businessman and the documents in question have been carefully framed in legal terminology taking into account the relevant provisions of law. The transaction also discloses the awareness of the defendant about Section 58(c)4 of the Transfer of Property Act as is evident from the fact that the reconveyance clause is not embodied in the sale deed itself. In the agreement to sell, no reference has been made to the transaction of sale though it has been executed contemporaneously. The defendant who has permitted the plaintiff to continue in possession on payment of rent equivalent to about 13= per cent interest and was evidently aware of all the dimensions of the matter would not have granted any concession or executed the agreement by way of a concession. The agreement was executed evidently because the plaintiff would not have executed the sale deed unless an agreement to sell by a contemporaneous document was also executed to enable the plaintiff to enforce specific performance within ten years. It was therefore

a transaction entered into with open eyes by the defendant and there was no question of granting any concession.

PRESUMPTION AND PROOF

M. Shanthilal Jain vs. S. Manjula : MANU/KA/0492/2016

"(i) In M.S. NARAYANA MENON ALIAS MANI v. STATE OF KERALA AND ANOTHER, MANU/SC/2881/2006 : (2006) 6 SCC 39, Apex Court has held that the presumptions under S.118(a) and 139 of the Act are rebuttable and that the standard of proof required for such rebuttal is preponderance of probabilities and not proof beyond reasonable doubts. The relevant paragraphs read as are: "29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act (the interpretation clause).

30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the

particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.....

32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.....

41.....Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."

(ii) The aforesaid decision was relied upon in K. PRAKASHAN v. P.K. SURENDERAN, MANU/SC/8009/2007 : (2008) 1 SCC 258 and the legal position was explained as hereunder: "13. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature.

14. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."

(iii) In KRISHNA JANARDHAN BHAT v. DATTATRAYA G. Hegde, MANU/SC/0503/2008 : (2008) 4 SCC 54, it has been held as follows: "32... Standard of proof on the part of an accused and that of the prosecution a criminal case is different.....

34. Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is preponderance of probabilities.....

45... Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section 139 should be delicately balanced."

CHAPTER - 11

BANK GUARANTEE

BANK GUARANTEE DEPENDS ON ITS EXPRESSED TERMS

In New India Assurance Company Ltd. v. Kusumanchi Kameshwara Rao and Another [(1997) 9 SCC 179], it is stated: "It is obvious that when such guarantee bonds are reduced to writing the express terms of this writing containing the guarantee bond would be the repository of the obligations of the guarantor flowing from the surety bond. As per Sections 91 and 92 of the Indian Evidence Act, 1872 no evidence dehors the terms of the agreement, whether documentary or oral, can be led by the parties to get out of the express terms thereof. Whether the express terms of the guarantee bond give rise to the contract of guarantee sought to be enforced will be the only limited enquiry which could be gone into by the courts while deciding the rights and obligations flowing from such contract of guarantee which is a tripartite contract between the creditor, principal debtor and the surety. Once such suretyship agreement is established on the clear terms of the bond then as laid down by the aforesaid decisions of this Court no latitude can be given to the contracting party, namely, the surety or even the principal debtor to enable them to get out of the obligations of the

suretyship agreement flowing from such contract, except in exceptional circumstances as indicated in these decisions."

In Hindustan Construction Co. Ltd. v. State of Bihar and Others [(1999) 8 SCC 436], the guarantee in question was in the following terms: "We, State Bank of India, incorporated under the State Bank of India Act, 1955, and having one of our branches at Nyayamurti C.N. Vaidya Marg, Fort, Bombay-400 023 (hereinafter referred to as 'the said Bank'), as instructed by the contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, District Singhbhum, Bihar, on his first demand without whatsoever right of objection on our part and without his first claim to the contractor, in the amount not exceeding Rs.10,00,000 (Rupees ten lakhs only) in the event that the obligations expressed in the said clause of the above- mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract" Despite such conditions, holding that the guarantee in question was a performance guarantee, this Court opined: "The Bank, in the above guarantee, no doubt, has used the expression "agree unconditionally and irrevocably" to guarantee payment to the Executive

Engineer on his first demand without any right of objection, but these expressions are immediately qualified by following: "... in the event that the obligations expressed in the said clause of the above-mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilisation loan from the contractor under the contract."

Hindustan Construction Co. Ltd. vs. State of Bihar & Ors. (1999) 8 SCC 436

"8. Now, a Bank Guarantee is the common mode, of securing payment of money in commercial dealings as the beneficiary, under the Guarantee, is entitled to realise the whole of the amount under that Guarantee in terms thereof irrespective of any pending dispute between the person on whose behalf the Guarantee was given and the beneficiary." at paragraph 9, the Hon'ble Supreme Court has specifically held that a bank guarantee should be in unequivocal and unconditional terms and the terms of the bank guarantee are extremely material. However, in the said decision, it was held that the bank guarantee could not be invoked by anyone except the Chief Engineer. It was in this background that the invocation was held to be totally wrong and could not be held to be payable to the Executive Engineer.

Daewoo Motors India Ltd. v. Union of India and Others [(2003) 4 SCC 690]. The bank guarantee

involved therein inter alia read as under: "We, Times Bank Ltd., PTI Building, Parliament Street, New Delhi, 110 001 further agree that the demand made by the President of India any money so demanded notwithstanding any dispute raised by M/s Daewoo Motors India Ltd. in any proceeding before any court or tribunal; We, Times Bank Ltd., PTI Building, Parliament Street, New Delhi 110 001 further agree that the demand made by the President of India shall be conclusive as regards the amount due and payable by us under these presents as out of liability under these presents are absolute and unequivocal;" Construing the terms thereof, this Court held: "From a perusal of the above clauses, it is abundantly clear that the bank guarantee furnished by the Bank is an unconditional and absolute bank guarantee. The Bank has rendered itself liable to pay the cash on demand by the President of India "notwithstanding any dispute raised by M/s Daewoo Motors India Limited in any proceeding before any court or tribunal". It is worth noticing that the clause in the bank guarantee specifically provides that the demand made by the President of India shall be conclusive as regards the amount due and payable by the Bank under this guarantee and the liability under the guarantee is absolute and unequivocal. In the face of the clear averments, it is trite to contend that the bank guarantee is a conditional bank guarantee. Therefore, the Bank has no case to resist the encashment of the bank guarantee. Inasmuch as we have held that the

bank guarantee is an unconditional bank guarantee, the case of Hindustan Construction Co. Ltd. v. State of Bihar [(1999) 8 SCC 436], is of no avail to the appellant."

Hon'ble Supreme Court. In National Highway Authority of India vs. Ganga Enterprises and Another (2003)7 SCC 410 it has been held at paragraph 10 as follows: The law regarding enforcement of an "on-demand bank guarantee" is very clear. If the enforcement is in terms of the guarantee, then courts must not interfere with the enforcement of bank guarantee. The court can only interfere if the invocation is against the terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an 'on-demand guarantee" in accordance with its terms by looking at the terms of the underlying contract. The existence or non-existence of an underlying contract becomes irrelevant when the invocation is in terms of the bank guarantee.

In U.P State Sugar Corporation vs. Sumac International Ltd. (1997)1 SCC 568 it has been held at paragraph 12 as follows: The law relating to invocation of such bank guarantees is by now well settled. When in the course of commercial dealings an unconditional bank guarantee is given or accepted, the beneficiary is entitled to realize such a bank guarantee in terms thereof irrespective of any pending

disputes. The bank giving such a guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer. The very purpose of giving such a bank guarantee would otherwise be defeated. The courts should, therefore, be slow in granting an injunction to restrain the realization of such a bank guarantee. The courts have carved out only two exceptions. A fraud in connection with such a bank guarantee would vitiate the very foundation of such a bank guarantee. Hence if there is such a fraud of which the beneficiary seeks to take advantage, he can be restrained from doing so. The second exception relates to cases where allowing the encashment of an unconditional bank guarantee would result in irretrievable harm or injustice to one of the parties concerned. Since in most cases payment of money under such a bank guarantee would adversely affect the bank and its customer at whose instance the guarantee is given, the harm or injustice contemplated under this head must be of such an exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country.

In General Electric Technical Services Co. Inc. v. Punjab Sons (P) Ltd. [(1991) 4 SCC 230] it has also been held that: "The Bank must honour the bank guarantee free from interference by the courts. Otherwise, trust in commerce internal and

international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice, the court should interfere. ... The nature of the fraud that the courts talk about is fraud of an 'egregious nature as to vitiate the entire underlying transaction'. It is fraud of the beneficiary, not the fraud of somebody else."

In Svenska Handelsbanken v. M/s Indian Charge Chrome and Others: (1994) 1 SCC 502, the Supreme Court had held that confirmed bank guarantees/irrevocable letters of credit cannot be interfered with unless there is fraud and irretrievable injustice involved in the case. The Court further observed that fraud has to be an established fraud.

In Larsen &Tourbo Limited v. Maharashtra State Electricity Board and Others: (1995) 6 SCC 68, the Supreme Court referred to its earlier decision in Svenska Handelsbanken and held as under:-

"5. Before we adjudicate the rival pleas urged before us by counsel for the parties, it will be useful to bear in mind the salient principles to be borne in mind by the court in the matter of grant of injunction against the enforcement of a bank guarantee / irrevocable letter of credit. After survey of the earlier decisions of this Court in United Commercial Bank v Bank of India, U.P. Coop. Federation Ltd. v Singh Consultants & Engineers (P) Ltd., General Electric Technical Services Co. Inc v Punj Sons (P) Ltd. and the decision

of the Court of Appeal in England in *Elia* and *Rabbath v Matsas* and *Matsas* and a few American decisions, this Court in *Svenska Handelsbanken v. Indian Charge Chrome* [AIR 1994 SC 626], laid down the law thus: "...in case of confirmed bank guarantees/ irrevocable letters of credit, it cannot be interfered with unless there is fraud and irretrievable injustice involved in the case and fraud has to be an established fraud... ...irretrievable injustice which was made the basis for grant of injunction really was on the ground that the guarantee was not encashable on its terms... ...there should be prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties. Mere irretrievable injustice without prima facie case of established fraud is of no consequence in restraining the encashment of bank guarantee."

In U.P. Cooperative Federation Ltd. v. Singh Consultants and Engineers (P) Ltd.: (1988) 1 SCC 174, Justice Sabyasachi Mukherji referred to an earlier decision in *United Commercial Bank v. Bank of India*: AIR 1981 SC 1426 and held as under:- "On the basis of these principles I reiterate that commitments of banks must be honoured free from interference by the courts. Otherwise, trust in commerce internal and international would be irreparably damaged. It is only in exceptional cases that is to say in case of fraud or in case of irretrievable injustice be done, the court should interfere." Justice

Jagannath Shetty in his concurring opinion further explained that: "The nature of the fraud that the Courts talk about is fraud of an "egregious nature as to vitiate the entire underlying transaction". It is fraud of the beneficiary, not the fraud of somebody else. If the bank detects with a minimal investigation the fraudulent action of the seller, the payment could be refused."

In Hindustan Steel Works Construction Ltd. v. Tarapore & Co. and Anr.: AIR 1996 SC 2268 , the Supreme Court held as under: "We are, therefore, of the opinion that the correct position of law is that commitment of banks must be honoured free from interference by the courts and it is only in exceptional cases, that is to say, in case of fraud or in a case where irretrievable injustice would be done if bank guarantee is allowed to be encashed, the court should interfere. In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/Respondent 1 on the ground that special equities or the special circumstances of the case required it. The special circumstances and/or special equities which have been pleaded in this case are that there is a serious dispute on the question as to who has committed breach of the contract, that the contractor has a counter-claim against the appellant, that the disputes between the parties have been referred to the arbitrators and that no amount can be said to be due and payable by the contractor to the

appellant till the arbitrators declare their award. In our opinion, these factors are not sufficient to make this case an exceptional case justifying interference by restraining the appellant from enforcing the bank guarantees. The High Court was, therefore, not right in restraining the appellant from enforcing the bank guarantees."

IRREVOCABLE OBLIGATIONS ASSUMED BY BANKS

Supreme Court in the matter of United Commercial Bank v. Bank of India and others (1981) 2 SCC 766 in which Their Lordships referred to a passage from R.D. Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd. (1977) 3 WLR 752 with approval which states as under: - "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the

guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

"The courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of letter of credit or a bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter of guarantee or credit executed by it, the whole banking system in the country would fail. It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

BANK GAURANTEE AND COURT INJUNCTION

Court in Himadari Chemicals Industries Ltd. v. Coal Tar Refining Company (2007) 8 SCC 110, wherein certain principles were formulated to be

followed in matters of injunctions to restrain encashment of a Bank Guarantee. The following are the principles that were laid down:

"(i) While dealing with an application for injunction in the course of commercial dealings, and when an unconditional bank guarantee or letter of credit is given or accepted, the beneficiary is entitled to realise such a bank guarantee or a letter of credit in terms thereof irrespective of any pending disputes relating to the terms of the contract.

(ii) The bank giving such guarantee is bound to honour it as per its terms irrespective of any dispute raised by its customer.

(iii) The courts should be slow in granting an order of injunction to restrain the realisation of a bank guarantee or a letter of credit.

(iv) Since a bank guarantee or a letter of credit is an independent and a separate contract and is absolute in nature, the existence of any dispute between the parties to the contract is not a ground for issuing an order of injunction to restrain enforcement of bank guarantees or letters of credit.

(v) Fraud of an egregious nature which would vitiate the very foundation of such a bank guarantee or letter of credit and the beneficiary seeks to take advantage of the situation.

(vi) Allowing encashment of an unconditional bank guarantee or a letter of credit would result in irretrievable harm or injustice to one of the parties concerned."

In Calcutta High court The Hon'ble Justice Soumen Sen and The Hon'ble Justice Ravi Krishan Kapur in the case of State Bank of India vs Sun Pharmaceuticals Industries ... Decided on 4 September, 2019 in Civil Appellate Jurisdiction Original side in APO no. 119/2019 and C.S. no. 39/2019 it is stated as follows:-

The limited categories on which the Court may refuse encashment of a bank guarantee or a performance guarantee are summarized below:-

- (i) If there is a fraud in connection with the bank guarantee which would vitiate the very foundation of such guarantee and the beneficiary seeks to take advantage of such fraud.
- (ii) The applicant, in the facts and circumstances of the case, clearly establishes a case of irretrievable injustice or irreparable damage.
- (iii) The applicant is able to establish exceptional or special equities of the kind which would prick the judicial conscience of the Court.
- (iv) When the bank guarantee is not invoked strictly in its terms and by the person empowered to invoke under the terms of the guarantee. In other words, the letter of invocation is in apparent violation to the specific terms of the bank guarantee.

M/S. Reliance Salt Ltd vs M/S. Cosmos Enterprises & Anr 2006 (13) SCC 599 - Court by explaining what is contract of guarantee and fraud

under law, it says, "Bank Guarantee constitutes an agreement between the Banker and the Principal, albeit, at the instance of the promisor. When a contract of guarantee is sought to be invoked, it was primarily for the bank to plead a case of fraud and not for a promisor to set up a case of breach of contract."

"Contract of guarantee" is defined under Section 126 of the Indian Contract Act in the following terms :
 "126. 'Contract of guarantee', 'surety', 'principal debtor' and 'creditor' - "A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

"Fraud" is defined in Section 17 of the Indian Contract Act, 1872 in the following terms : "S.17. "Fraud" defined. "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;

- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specifically declares to be fraudulent.

Explanation. "Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

The Apex Court in Gujarat Maritime Board Vs. L&T Infrastructure Development Projects Ltd. & Ors., (2016) 10 SCC 46 held that injunction against invocation of an absolute and an unconditional BG cannot be guaranteed except in the exceptional two cases, A. In the event of egregious fraud, which vitiates the entire underlined transactions and of which the Bank has notice; or B. Irretrievable injury/injustice. The irretrievable injury must be of an exceptional circumstance of the kind where it is impossible for the guarantor to reimburse himself if he ultimately succeeds in final adjudication of the disputes. The Apex Court was examining the Bank Guarantee given by the Bank to the appellant therein which contained the following stipulation: "without any demur, merely on a demand from GMB (appellant) stating that the said lead promotor failed to perform the covenants...". It has also been undertaken by the bank that such written demand from the appellant

shall be "...conclusive, absolute and unequivocal as regards the amount due and payable by the bank under this guarantee". Between the appellant therein and the first respondent, in the event of failure to perform the obligations under the LOI the appellant was entitled to cancel the LOI and invoke the Bank Guarantee. On being satisfied of the failure of the respondent, the appellant cancelled the LOI and invoke the Bank Guarantee." The Apex Court held that between the Bank and the appellant, the moment there was a written demand for invoking the BG pursuant to breach of the covenant between the appellant and the respondent, the bank was bound to honour the payment under the Guarantee. The Apex Court held that the Bank Guarantee is a separate contract and is not qualified by the contract or performance of the obligations. No doubt, in terms of the BG also, the invocation is only against a breach of the conditions in the LOI, but between the appellant and the bank the decision of the appellant as to the breach is absolute and binding on the Bank.

Apex Court in Dwarikesh Sugar Industries Ltd. Vs. Prem Heavy Engineering Works (P) Ltd. and Anr, (1997) 6 SCC 450 has deprecated the practice of the High Courts in granting injunctions restraining the encashment of unconditional BGs and held that this would mean not complying with the law laid down by the Apex Court and would amount of judicial impropriety. The Apex Court held that the High Court

was not justified in invoking the principle of unjust enrichment and denying the appellant the right to encash the BG. It was further observed that if the High Court had taken the trouble to see the law on the point, it would have been clear that in encashment of BG, principle of undue enrichment has no application. Relevant para of judgment reads as under: "29. It is unfortunate that the High Court did not consider it necessary to refer to various judicial pronouncements of this Court in which the principles which have to be followed while examining an application for grant of interim relief have been clearly laid down. The observation of the High Court that reference to judicial decisions will not be of much importance was clearly a method adopted by it in avoiding to follow and apply the law as laid down by this Court. Yet another serious error which was committed by the High Court, in the present case, was not to examine the terms of the bank guarantee and consider the letters of invocation which had been written by the appellant. If the High Court had taken the trouble of examining the documents on record, which had been referred to by the trial court, in its order refusing to grant injunction, the court would not have granted the interim injunction. We also do not find any justification for the High Court in invoking the alleged principle of unjust enrichment to the facts of the present case and then deny the appellant the right to encash the bank guarantee. If the High Court had taken the trouble to see the law on the point it would

have been clear that in encashment of bank guarantee the applicability of the principle of undue enrichment has no application. 32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

The Apex Court in the case of Mahatma Gandhi Sahakra Sakkare Karkhane Vs. National Heavy Engg. Coop. Ltd. and Anr. (2007) 6 SCC 470, ruled that the right of the purchaser to recover from the guarantor, the guaranteed amount shall not be effected or suspended by reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that any proceedings are pending in any other Court of Law. The Apex Court was dealing with certain clauses of the BG where the guarantor had undertaken to pay to the appellant within 30 days of demand, without demur, a certain sum of money. The Apex Court repelled the contention of the seller that the purchaser could invoke the bank

guarantee only on failure of the supplier to conduct the trial test and fulfil other obligations and held that the argument that pending a dispute relating to the failure or breach of one party, cannot be accepted as being a ground to restrain invocation. The dispute, if any, with regard to the liability in any Court of law will have no bearing on encashment of the BG. It was held that once the BG is unconditional and irrevocable, it is not open to the bank to raise any objection whatsoever to pay the amounts under the Guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by an injunction in enforcing the same on the ground that the condition for enforcing the BG in terms of the agreement has not been fulfilled. Such a course is impermissible. Relevant paras read as under; 18. A plain reading of Clauses (1) and (2) of the bank guarantee makes it abundantly clear that the guarantor had undertaken to pay to the appellant within 30 days of demand, without demur such an amount not exceeding Rs 92.40 lakhs. The sole discretion is conferred on the purchasers as to whether the amount of bank guarantee has become recoverable from the sellers or whether the sellers have committed any breach of the terms and conditions of the said agreement. The right of the purchaser to recover from the guarantor the guaranteed amount shall not be affected or suspended by the reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that the proceedings are pending before any

tribunal or court with regard thereto or in connection therewith. 19. However, Shri Jayant Bhushan, learned Senior Counsel submitted that the purchasers were entitled to invoke the bank guarantee and demand the payment of money only upon the failure of the supplier to conduct the trial test of the sugar plant by 24-7-2003 and also upon the failure of the sellers to commission the project before December 2003. This condition forms an integral part of the bank guarantee was the submission. We find it difficult to accept the submission. The guarantee executed by the guarantor (PNB) in favour of the purchaser (the appellant) cannot be dissected in the manner suggested by the learned Senior Counsel for the respondent. Clauses 1 and 2 of the guarantee executed by the banker in favour of the purchaser are required to be read together. The respondent cannot be allowed to contend that there is a dispute as to whether it had failed to conduct the trial test of the sugar plant by 24-7-2003 and therefore bank guarantee cannot be invoked. The acceptance of the argument would make Clause 2 of the bank guarantee totally meaningless and inoperative. The guarantor essentially agreed that the purchasers alone shall be the sole judge in the matter as to whether the amount of bank guarantee has become recoverable from the sellers or whether the seller had committed any breach of the terms and conditions of the agreement. The dispute, if any, between the parties with regard to the liability in any proceedings either before the

Arbitral Tribunal or court in no manner affects the right of the purchaser to invoke the bank guarantee and realise the guaranteed sum from the guarantor. 22. In our considered opinion if the bank guarantee furnished is an unconditional and irrevocable one, it is not open to the bank to raise any objection whatsoever to pay the amounts under the guarantee. The person in whose favour the guarantee is furnished by the bank cannot be prevented by way of an injunction in enforcing the guarantee on the pretext that the condition for enforcing the bank guarantee in terms of the agreement entered between the parties has not been fulfilled. Such a course is impermissible. The seller cannot raise the dispute of whatsoever nature and prevent the purchaser from enforcing the bank guarantee by way of injunction except on the ground of fraud and irretrievable injury."

In Vinitec Electronics Private Ltd. v. HCL Infosystems Ltd., (2008) 1 SCC 544, the Supreme Court after relying upon various earlier judgments of the Court reiterated that the allegation with regard to the alleged breach of a contract by the respondent is not a plea of fraud of a egregious nature so as to vitiate the entire transaction. Paragraphs 24 to 28 of the Judgment are quoted herein below:

"24. The next question that falls for our consideration is as to whether the present case falls under any of or both the exceptions, namely, whether there is a clear

fraud of which the Bank has notice and a fraud of the beneficiary from which it seeks to benefit and another exception whether there are any "special equities" in favour of granting injunction.

25. This Court in more than one decision took the view that fraud, if any, must be of an egregious nature as to vitiate the underlying transaction. We have meticulously examined the pleadings in the present case in which no factual foundation is laid in support of the allegation of fraud. There is not even a proper allegation of any fraud as such and in fact the whole case of the appellant centres around the allegation with regard to the alleged breach of contract by the respondent. The plea of fraud in the appellant's own words is to the following effect:

"That despite the respondent HCL being in default of not making payment as stipulated in the bank guarantee, in perpetration of abject dishonesty and fraud, the respondent HCL fraudulently invoked the bank guarantee furnished by the applicant and sought remittance of the sums under the conditional bank guarantee from Oriental Bank of Commerce vide letter of invocation dated 16-12-2003."

26. In our considered opinion such vague and indefinite allegations made do not satisfy the requirement in law constituting any fraud much less the fraud of an egregious nature as to vitiate the entire transaction. The case, therefore does not fall within the first exception.

27. Whether encashment of the bank guarantee would cause any "irretrievable injury" or "irretrievable injustice". There is no plea of any "special equities" by the appellant in its favour. So far as the plea of "irretrievable injustice" is concerned the appellant in its petition merely stated:

"That should the respondent be successful in implementing its evil design, the same would not only amount to fraud, cause irretrievable injustice to the applicant, and render the arbitration nugatory and infructuous but would permit the respondent to take an unfair advantage of their own wrong at the cost and extreme prejudice of the applicant."

28. The plea taken as regards "irretrievable injustice" is again vague and not supported by any evidence.

In Gujarat Maritime Board v. Larsen and Toubro Infrastructure Development Projects Limited, (2016) 10 SCC 46, the Supreme Court once again cautioned that bank guarantee is a separate contract and is not qualified by the contract under which it is given. Whether the cancellation was just and proper is a question to be decided by the Arbitrator and not by Court under Section 9 of the Act, the relevant paragraphs of the said Judgment are:

"9. Unfortunately, the High Court went wrong both in its analysis of facts and approach on law. A cursory reading of LoI would clearly show that it is not a case of forfeiture of security deposit "... if the contract had frustrated on account of impossibility..." but

invocation of the performance bank guarantee. On law, the High Court ought to have noticed that the bank guarantee is an independent contract between the guarantor Bank and the guarantee appellant. The guarantee is unconditional, no doubt, the performance guarantee is against the breach by the lead promoter viz. the first respondent. But between the bank and the appellant, the specific condition incorporated in the bank guarantee is that the decision of the appellant as to the breach is binding on the Bank. The justifiability of the decision is a different matter between the appellant and the first respondent and it is not for the High Court in a proceeding under Article 226 of the Constitution of India to go into that question since several disputed questions of fact are involved.

11. It is contended on behalf of the first respondent that the invocation of bank guarantee depends on the cancellation of the contract and once the cancellation of the contract is not justified, the invocation of bank guarantee also is not justified. We are afraid that the contention cannot be appreciated. The bank guarantee is a separate contract and is not qualified by the contract on performance of the obligations. No doubt, in terms of the bank guarantee also, the invocation is only against a breach of the conditions in the LoI. But between the appellant and the Bank, it has been stipulated that the decision of the appellant as to the breach shall be absolute and binding on the Bank.

12. An injunction against the invocation of an absolute and an unconditional bank guarantee cannot be granted except in situations of egregious fraud or irretrievable injury to one of the parties concerned. This position also is no more *res integra*.

.....

13. The guarantee given by the Bank to the appellant contains only the condition that in case of breach by the lead promoter viz. the first respondent of the conditions of LoI, the appellant is free to invoke the bank guarantee and the Bank should honour it "... without any demur, merely on a demand from GMB (appellant) stating that the said lead promoter failed to perform the covenants...". It has also been undertaken by the Bank that such written demand from the appellant on the Bank shall be "... conclusive, absolute and unequivocal as regards the amount due and payable by the Bank under this guarantee". Between the appellant and the first respondent, in the event of failure to perform the obligations under the LoI dated 6-2- 2008, the appellant was entitled to cancel the LoI and invoke the bank guarantee. On being satisfied that the first respondent has failed to perform its obligations as covenanted, the appellant cancelled the LoI and resultantly invoked the bank guarantee. Whether the cancellation is legal and proper, and whether on such cancellation, the bank guarantee could have been invoked on the extreme situation of the first respondent justifying its inability to perform its obligations under the LoI, etc. are not

within the purview of an inquiry under Article 226 of the Constitution of India. Between the Bank and the appellant, the moment there is a written demand for invoking the bank guarantee pursuant to breach of the covenants between the appellant and the first respondent, as satisfied by the appellant, the Bank is bound to honour the payment under the guarantee."

Court in U.P. Coop. Federation Ltd. v. Singh Consultants and Engineers (P) Ltd. [(1988) 1 SCC 174] The second exception to the rule of granting injunction, i.e., the resulting of irretrievable injury, has to be such a circumstance which would make it impossible for the guarantor to reimburse himself, if he ultimately succeeds. This will have to be decisively established and it must be proved to the satisfaction of the court that there would be no possibility whatsoever of the recovery of the amount from the beneficiary, by way of restitution.

In Ansal Engineering Projects Ltd. v Tehri Hydro Development Corporation Ltd, (1996) 5 SCC 450 a three judge Bench of this Court held thus: "4. It is settled law that bank guarantee is an independent and distinct contract between the bank and the beneficiary and is not qualified by the underlying transaction and the validity of the primary contract between the person at whose instance the bank guarantee was given and the beneficiary. Unless fraud or special equity exists, is pleaded and prima facie

established by strong evidence as a triable issue, the beneficiary cannot be restrained from encashing the bank guarantee even if dispute between the beneficiary and the person at whose instance the bank guarantee was given by the bank, had arisen in performance of the contract or execution of the works undertaken in furtherance thereof. The bank unconditionally and irrevocably promised to pay, on demand, the amount of liability undertaken in the guarantee without any demur or dispute in terms of the bank guarantee...

5. ...The court exercising its power cannot interfere with enforcement of bank guarantee/letters of credit except only in cases where fraud or special equity is prima facie made out in the case as triable issue by strong evidence so as to prevent irretrievable injustice to the parties.”

Andhra Pradesh Pollution Control Board vs. CCL Products (India) Limited 2019 (11) SCALE 685

The settled legal position which has emerged from the precedents of this Court is that absent a case of fraud, irretrievable injustice and special equities, the Court should not interfere with the invocation or encashment of a bank guarantee so long as the invocation was in terms of the bank guarantee.....In the present case, the bank undertook to the appellant that it would pay the guaranteed amount on demand, subject to the overall amount stipulated in each of the three bank guarantees. It was not for the bank to

determine as to whether the invocation of the bank guarantees was justified so long as the invocation was in terms of the bank guarantee. A demand once made would oblige the bank to pay under the terms of the bank guarantee. The State Bank of India correctly understood its legal obligations and paid over the amount to the appellant.

In Calcutta High court The Hon'ble Justice Soumen Sen and The Hon'ble Justice Ravi Krishan Kapur in the case of State Bank of India vs Sun Pharmaceuticals Industries ... Decided on 4 September, 2019 in Civil Appellate Jurisdiction Original side in APO no. 119/2019 and C.S. no. 39/2019 it is stated as follows:- There are a plethora of decisions not only of the Indian Courts but also of other jurisdictions from which the following further well settled principles emerge:

- a) The Courts are ordinarily slow in granting an order of injunction to restrain the working of a bank guarantee. U.P. State Sugar Corporation vs. Sumac International Ltd. (1997) 1 SCC 568 at para 12, Himadri Chemicals Industries Ltd. vs. Coal Tar Refining Company (2007) 8 SCC 110 at para 14 (iii).
- b) A bank guarantee is a distinct, separate and independent contract and absolute in nature. Such a contract is independent of the underlying contract or the matrix contract between the beneficiary and the principal debtor or the person at whose instance the bank guarantee has been issued. It is a fundamental

feature of bank guarantees that contracts relating to them are autonomous and separate from the underlying contract. The bank is not concerned in any way with the merits or the demerits of the underlying transactions. It is only in well known and extremely exceptional circumstances should a Court interfere with payment under bank guarantees always bearing in mind that free and unrestricted flow of normal commercial dealings is a prime consideration. *Andhra Pradesh Pollution Control Board vs. CCL Products (India) Limited* 2019 SCCOnLine SC 985 2019 (11) SCALE 685 at para 19, *Ansal Engineering Projects Ltd. vs. Tehri Hydro Development Corporation Ltd. and Ors.* (1996) 5 SCC 540 at paras 4 and 5, *Hindustan Steel Works Construction Ltd. vs. Tarapore & Co. & Ors.* (1996) 5 SCC 34 at para 14, *Federal Bank Ltd. Vs. M Jog Engineering Ltd.* (2001) 1 SCC 633 at para 55. *State of Maharashtra & Anr. Vs. National Construction Company Bombay and Another* (1996) 1 SCC 735 at para 13.

c) What is of essence in such matters are the terms of the bank guarantee. These are extremely significant, vital, decisive and material. A bank guarantee must be construed independently on its own terms. In every case, what has to be ascertained is whether the bank guarantee is in unequivocal and in clear terms that is to say, whether it is conditional or unconditional and whether it clearly recites that the amounts thereunder are to be paid without demur or protest. Then, there is always the question of whether the invocation of a

bank guarantee is in terms of the bank guarantee or else the invocation may be bad. What every Court must be careful of is to that whilst interpreting the bank guarantee it does not get entwined into the terms and conditions of the underlying contract between the beneficiary and the principal debtor. This intermingling is prohibited unless the terms and conditions of the bank guarantee so provide in clear and identifiable terms. *Mahatma Gandhi Sahakra Sakkare Karkhane v. National Heavy Engineering Cooperative Ltd. & Anr.* AIR 2007 SC 2716 at paras 22 and 28, *Eastern Countries Building Society vs. Russell* (1947) 1 All ER 500 at 502-503.

d) In the absence of fraud, irretrievable injustice or some special equities the Courts should not interfere with the working of a bank guarantee as long as the bank guarantee has been lawfully invoked. The evidence of the fraud which is demanded is required to be of an egregious nature which is such as to vitiate the entire underlying transaction or such that the beneficiary seeks to take advantage of some exceptional situation. There must also be clear and convincing evidence both as to the fraud and as to the bank's knowledge of the fraud. Fraud which vitiates the contract ordinarily must have a nexus with the acts of the parties prior to entering into the contract. Simple breach of contract occurring subsequently on the part of a party would not vitiate the guarantee itself. Nor would breach of contract alone lead to the conclusion that fraud has been committed. The other

exceptions of irretrievable injury and special equities can only be invoked in exceptional or rare cases. The most commonly cited example is that of the American decision in *Itek Corporation* (566 Fed supp.1210). In that case, it was held on the facts that it was impossible for the guarantor to reimburse himself if he ultimately succeeded at trial. A mere apprehension that a party could not or would not pay is not enough. In the *Itek* decision, there was certainty on this issue. The second reason which weighed with the American Court was that the Court was *prima facie* satisfied that the guarantor i.e. bank would be found entitled to receive the amount paid under the guarantee. Thus, the rule is that special equity or the case of irretrievable injury must be of an exceptional nature. It must be one of those rare cases where a future decree for money in favour of the guarantor proves to be unrealisable or uncollectible which would be equivalent to putting a party in an irretrievable situation. Special equities or irretrievable justice must not be confused with mere hardship or what a Judge may consider to be just and proper. It is not akin to the Chancellor's foot or as what a Judge may regard to be his interpretation of unjust or unfair or inequitable. *Reliance Salt Ltd. Vs. Cosmos Enterprise and Anr.* (2006) 13 SCC 599 at paras 16 and 17, *State Bank of India vs. Mula Sahakari Sakhan Karkhana Ltd.* (2006) 6 SCC 293 at paras 33, 34 & 42, *Svenska Handelsbanken vs. Indian Charge Chrome and Ors.* (1994) 1 SCC 502 at paras 38 to 40, 84, and 86,

National Highways Authority of India vs. ELSAMEX-TWS-SNC Joint Venture 2008 Supp.(1) ArbLR 559 at para 68, Vinitec Electronics Private Limited vs. HCL Infosystems Limited (2008) 1 SCC 544 at paras 25 and 27, BSES Ltd. (now Reliance Energy Ltd.) vs. Fenner India Ltd. and Ors. AIR 2006 SC 1148 at para 10, Owen Engineering Ltd. Vs. Barclays Bank International Ltd. (1978) 1 All ER 976 at 983 (b) & c.

e) In Dwarikesh Sugar Industries Limited vs. Prem Heavy Engineering Works Limited (1976) 4 SCC 480 at para 22, it was held that, the special consideration of irretrievable injury meant a circumstance that made it impossible for the guarantor to reimburse itself by way of restitution. In U.P. State Sugar Corporation vs. Sumac International Ltd. at para 12, it was held that, the fact that the beneficiary was a sick company and revival was pending under the Sick Industrial Company (Special Provisions) Act, 1985 was not to be regarded as a circumstance where that the money would be irretrievably lost if the claim ultimately was awarded in favour of the contractor.

f) There was an attempt in BSES Ltd. vs. Fenner India Ltd. and Ors. (2006) 2 SCC 728 at para 10 to widen the exceptions to the rule against interference with bank guarantees by including the principles of "lack of good faith" or "enforcing with an oblique motive" following Singaporean Law but this was rejected by the Apex Court.

LAW RELATING TO BANK GUARANTEES

In Calcutta High court The Hon'ble Justice Soumen Sen and The Hon'ble Justice Ravi Krishan Kapur in the case of State Bank of India vs Sun Pharmaceuticals Industries ... Decided on 4 September, 2019 in Civil Appellate Jurisdiction Original side in APO no. 119/2019 and C.S. no. 39/2019 it is stated as follows:-

a) I am of the view that the law relating to bank guarantees has been certain, comprehensible and well settled. The problem which has arisen has been in its application. Section 126 of the Contract Act 1872 defines a "contract of guarantee" as a contract to perform the promise or discharge the liability of a third person in case of his default. In Halsbury's Laws of England [4th Edition para 101 Volume 20] a bank guarantee has been defined as "an accessory contract whereby the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person whose primary liability to the promisee must exist or be contemplated". In order to be enforceable in law, a guarantee must be in writing.

b) Ordinarily, there are three parties to a guarantee they are: firstly, the principal debtor or the person at whose instance the guarantee is issued or the person in respect of whose default the guarantee is given. Secondly, the guarantor or surety which is usually a bank or a financial institution is the person who gives the guarantee and lastly, the beneficiary or the creditor who is the person to whom the guarantee is

given. In such cases a bank or a financial institution acting as the guarantor or a surety makes itself immediately liable to the full extent for the obligations due to the beneficiary.

c) Bank guarantees are the most common method of payment in the mercantile world and have been described as the "the life blood of international commerce (as per Kerr L.J. In R.D. Harbottle (Mercantile) Ltd. vs. National Westminster Bank Ltd. [1978] Q.B. 146 at 155 where they are treated as equivalent to cash. It is for this reason that Donaldson L.J. in a commonly cited passage observed "Irrevocable letter of credit and bank guarantees given in circumstances such that they are equivalent to an irrevocable letters of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud, is involved, the courts intervened and thereby disturbed the mercantile practice of treating rights thereunder as being equivalent to cash in hand". [Intraco vs. Notis Shipping Corporation of Liberia the Bhoja Trader [1981] 2 Lloyds Report 256 at 257].

d) "Thrombosis" has been defined as a local coagulation or clotting of blood in a part of the circulatory system which creates a traffic congestion in the free circulation of blood (The New Shorter Oxford Dictionary 1993 Edition). In certain cases, it may cause instant death and I imagine that this is the kind of serious impact which is caused every time any Court interferes with or interdicts with the working of

a bank guarantee. A Court by interdicting or interfering with the working of the bank guarantee is in effect intimating to the beneficiary that "your cash is not cash or that you are not entitled to your cash." This is akin to thrombosis in the business world.

NO INTERIM INJUNCTION AGAINST BANK GURANTEE

In Calcutta High court The Hon'ble Justice Soumen Sen and The Hon'ble Justice Ravi Krishan Kapur in the case of State Bank of India vs Sun Pharmaceuticals Industries ... Decided on 4 September, 2019 in Civil Appellate Jurisdiction Original side in APO no. 119/2019 and C.S. no. 39/2019 it is stated as follows:-

At the outset, it is important to ascertain on a plain reading of the bank guarantee as to what are the terms and conditions of the instant bank guarantees. The duty of the bank is created by these documents themselves, that define the obligations of the parties. The nature of the bank guarantees has to be assessed from the terms thereof. I am of the view that a plain reading not requiring any further analysis of the guarantees establish that the guarantees were unconditional, irrevocable and unequivocal. In fact, they are as unconditional in their terms as they could possibly be. In my view, the clear words of the bank guarantees and the manner in which the banks promised to discharge their obligations made the bank guarantees unconditional. It is now well settled

that the fact that the bank guarantee merely refers to the underlying agreement without incorporating any specific clause in the guarantee does not make a guarantee conditional [Mahatma Gandhi Sahakra Sakkare Karkhane vs. National Heavy Engg. Coop. Ltd. (2007) 6 SCC 470]. I am of the view that there is nothing in the express or plain language of the guarantees which would make the same conditional. On the contrary, the guarantees provided were unconditional and irrevocable. Once it is found that the bank guarantees were unconditional and irrevocable, it was not open to the bank or the principal debtor to raise any objection whatsoever to pay the amounts under the guarantees. The beneficiary, in such circumstances, in whose favour the guarantees were furnished by the bank could not be prevented from enforcing the bank guarantee on the pretext that there were "serious breaches" of the underlying contract. The dispute between the beneficiary and the party at whose instance the bank guarantees had been given is immaterial and of no consequence. This is not to say that a Court cannot even look into the underlying contract to examine whether the bank guarantee has been encashed as per its terms or is not a result of fraud or an act which maybe classified as irretrievable injustice or exceptional special equities. However, in treading down this path, a Court must maintain a clear line of demarcation or division between that which can be considered and that which ought not to be considered.

There was no need to enter into the merits of the disputes relating to the principal contract or the issues regarding whether time was of essence of the contract or the allegation about repudiation or frustration. These issues or the question of passing of property were not called for nor any issues concerning payment for the price between the principal contractors. All of these were outside the arena of consideration at this stage. In this case the only issue involved at this stage is, whether the appellant bank could be restrained from enforcing either of the bank guarantees dependant on the terms of the guarantee themselves. I am of the view that even on the merits of the disputes of the underlying contract, it is highly debatable whether (a) time was of essence of the contract; (b) the underlying contract stood frustrated; (c) whether the extension of the bank guarantee was obtained by coercion; (d) whether there was a duty on the part of the appellant bank to inform the plaintiffs of the initiation of the proceedings before the NCLT and so on. These are all issues which would have to be ultimately decided in the suit. If called upon to opine, I would be inclined to hold that it appears at this prima facie stage, that, the plaintiffs had by their own conduct waived the term as to time being of the essence of the contract. On the contrary, it would seem that the plaintiffs having waited since 2015 to purchase these wind-mills thereafter had taken a commercial decision to wriggle out of its obligations. I prima facie find little merit in the case of frustration

as urged by the plaintiffs. I find that between 22 August, 2017 till 11 January, 2018 there was no embargo in conducting the sale. I find, *prima facie*, little merit in all these arguments at this stage because they are irrelevant to the issue raised in the interlocutory application. The only question at this stage was that whether an injunction should be issued or not against unconditional bank guarantees. As stated hereinabove, the bank guarantees were unconditional and irrevocable and were payable without demur or protest. I am of the view that, even if every ground urged by the plaintiffs on the merits of the underlying contract is accepted, it would still not be good enough for the plaintiffs to be entitled to any order of injunction restraining payment under the bank guarantees. None of the exceptions would come into play in the facts and circumstances of the instant case. The plaintiffs cannot show as to why they cannot wait till the final decision in the suit to obtain refund of the money which the appellant bank may receive upon encashment of the bank guarantees. It is also not the case of the plaintiffs that, the appellant bank does not have the means to satisfy any future decree which may be granted in favour of the plaintiffs. The plaintiffs have at the highest only canvassed a strong *prima facie* case that the appellant bank has committed a breach of contract and that it may be entitled to get the entire consideration refunded. All of the grounds urged by the plaintiffs deal with the underlying contract. This is what is meant by the

autonomy of the bank guarantees remaining independent of the underlying transactions i.e. the sale of the wind-mills. Here, a Court should not interfere to prevent the operation of bank guarantee on specious grounds which are extraneous to the guarantee itself.

WHETHER DOCUMENT IS GUARANTEE OR INDEMNITY

In the case of State Bank of India and anr. vs. Mula Sahakari Sakhar Karkhana Ltd. [(2006) 6 SCC 293], the Supreme Court in paras 23, 24, 43 and 45 observed as under :-

23. The document in question is a commercial document. It does not on its face contain any ambiguity. The High Court itself said that ex facie the document appears to be a contract of indemnity. Surrounding circumstances are relevant for construction of a document only if any ambiguity exists therein and not otherwise.

24. The said document, in our opinion, constitutes a document of indemnity and not a document of guarantee, as is clear from the fact that by reason thereof the appellant was to indemnify the Cooperative Society against all losses, claims, damages, actions and costs which may be suffered by it. The document does not contain the usual words found in a bank guarantee furnished by a bank as, for example, "unequivocal condition", "the Cooperative Society

would be entitled to claim the damages without any delay or demur" or the guarantee was "unconditional and absolute" as was held by the High Court.

43. However, in this case, we have no doubt in our mind that the document in question constitutes a contract of indemnity and not an absolute or unconditional bank guarantee. The High Court, therefore, erred in construing the same to be an unconditional and absolute bank guarantee.

45. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The decree of the trial court is restored.

BANK ISSUING A GUARANTEE IS NOT CONCERNED WITH THE UNDERLYING CONTRACT BETWEEN THE PARTIES

In the case of State of Maharashtra and anr. vs. National Construction Company, Bombay and anr. (1996) 1 SCC 735, Supreme Court in paras 13 and 14 observed as under :-

"13. At this juncture it seems necessary to analyze the law relating to bank guarantees. The rule is well established that a bank issuing a guarantee is not concerned with the underlying contract between the parties to the contract. The duty of the bank under a performance guarantee is created by the document itself. Once the documents are in order, the bank giving the guarantee must honour the same and make payment. Ordinarily, unless there is an allegation of

fraud or the like, the Courts will not interfere, directly or indirectly, to withhold payment, otherwise trust in commerce, internal and international, would be irreparably damaged. But that does not mean that the parties to the underlying contract cannot settle their disputes with respect to allegations of breach by resorting to litigation or arbitration as stipulated in the contract. The remedy arising ex-contractu is not barred and the cause of action for the same is independent of enforcement of the guarantee. ...

14. The legal position, therefore, is that a bank guarantee is ordinarily a contract quite distinct and independent of the underlying contract, the performance of which it seeks to secure. To that extent it can be said to give rise to a cause of action separate from that of the underlying contract. However, in the present case we are handicapped because the High Court (both the learned Single Judge and Division Bench) had no occasion to analyze the nature of the bank guarantee. We, therefore, refrain from making any observation regarding the true nature of the bank guarantee except pointing out that the two causes of action may not be identical. That would be a matter for the Trial Court to consider on a true analysis of the bank guarantee at the appropriate stage."

CHAPTER - 12
LAW OF MORTGAGE

WHERE EXECUTION OF DEED IS DENIED BY PERSON PURPORTED TO HAVE EXECUTED IT, IT IS MANDATORY TO PROVE ITS EXECUTION BY EVIDENCE OF ONE ATTESTING WITNESS AT LEAST.

In absence of such positive evidence to prove execution of mortgage deed, Court, held, is justified in dismissing Bank's suit based on such unproved deed of mortgage. No doubt, the deposit of title deeds need not be in writing. The deed of mortgage other than the mortgage of deposit of title deeds is required to be attested by two witnesses. In the instant case, as the mortgage is by depositing of title deeds under Section 58(f), there is no need to execute any document in order to create a charge in respect of an immovable property, as delivery of the title deeds itself is sufficient to create a charge in respect of an immovable property for the money borrowed. But, in the instant case, the Bank did not accept the list of documents said to have been delivered by the 2nd defendant to the Bank, since the title deed delivered is only a certified copy and not the original. As delivery of certified copy since has not been accepted by the Bank, the memorandum of deposit of title deed was got executed and registered. As the memorandum of title deed is a registered document and when that

document has been specifically denied by the 2nd defendant in his reply notice and in the written statement filed by the L.Rs of the 2nd defendant, the plaintiff-Bank ought to have examined one of the attesting witnesses to the said deed. In the instant case, no attesting witness has been examined in order to prove the execution of the document by the 2nd defendant. Further, the signature is disputed and as there is discrepancy in the spelling of the name in the absence of any positive evidence adduced by the plaintiff to prove the documents the Trial Court is justified in dismissing the suit insofar as the 2nd defendant is concerned. - Syndicate Bank, Dr. D.V.G. Road Branch, Bangalore v M, Sivarudrappa (Deceased) by L.Rs., 2003(2) Kar. L.J. 226.

CHARGE ON PROPERTY

Charge on immoveable property - Creation of - Where immovable property is made security for payment of money, it creates charge on property - Such charge is enforceable against subsequent transferee of property, unless subsequent transferee is shown to have acquired property for consideration and without notice of prior charge - Where such charge is for amount exceeding Rs. 100/- and has been created under compromise decree which is compulsorily registrable under law and has in fact been duly registered, subsequent transferee cannot feign ignorance of charge - Registration operates as constructive notice of charge and vested right of

subsequent transferee is subject to such prior charge. Held: The said compromise decrees are money decrees passed on the basis of compromise between the parties, creating a charge on the property in question. Both the said decrees were duly registered by the concerned Sub-Registrar. The vested right of any transfer of immoveable property acquired by any lawful transferee thereof would be subject to prior charge created on it either by act of parties or operation of law, unless the transferee is shown to have acquired the same for consideration and without notice of the charge. In the instant case, the property was purchased by the petitioners under valid registered sale deed dated 4-6-1988 and that it was purchased subsequent to the compromise decrees dated 11-11-1987 creating charge on the said property for realisation of the decretal amounts thereunder. Therefore, the petitioner could avoid legal effect of the said charge on the property only when and if they establish satisfactorily that the same was purchased by them without notice of the charge. - Sha Champalal Oswal v Peralu Achanna and Another, ILR 1997 Kar. 3434.

Decree for charge on property over which the person has a life interest - Charge cannot be operative beyond lifetime of person. - Subbakka by L.Rs v Appayya Rai, 1973(1) Mys. L.J. 71: AIR 1973 Mys. 230.

If a recurring charge is created for the payment of maintenance and the property on which the charge so

created is brought to sale for recovery of such maintenance which had become due, the sale of the property for recovery of such maintenance cannot destroy the right of the decree-holder to enforce the charge in respect of maintenance which subsequently becomes due. So long as the decree-holder has the right to recover future maintenance and the payment of that maintenance is secured by a recurring charge, on each occasion on which the maintenance due is not paid, the property can be brought to sale in enforcement of that charge, notwithstanding the fact that the property is in the hands of purchaser who has purchased it in execution of the decree for maintenance on a previous occasion. - K.T. Venkata Gowda v Devamma, 1963(1) Mys. LJ. 582 : AIR 1964 Mys. 40.

Non-mention of charge of maintenance in the sale-proclamation issued by the Court - Auction purchaser cannot avoid charge of maintenance on that ground - Scope of the provision explained. - Ramachandm Siddappa Kamgond v Lingaivwa and Others, ILR 1985 Kar. 470.

MORTGAGEE CANNOT EXECUTE SALE DEED

The mortgagee by executing the sale deed of the mortgaged property in favour of the appellant conferred no better title than what he had under a deed of mortgage viz., no more than the right of a

mortgagee. - **T. Diwakam vM. H. Ananthaswamy & Others, 1991 (1) Kar. L.J. 597.**

Section 58(a) of the Transfer of Property Act which defines 'mortgage' specifically says that a mortgage is a transfer of interest in a specific immovable property as security for the repayment of a debt. The nature of the right so transferred depends upon the form of mortgage. In a simple mortgage, the right to sell which is one of the component rights of ownership is transferred. Even after such transfer, he still remains the owner and if he transfers by way of sale after the mortgage, he would be selling the property itself and not mere right of redemption. Ownership is a bundle of rights and merely because the owner mortgages his property, it cannot be said that he is not entitled to transfer the property itself thereafter. In a mortgage, the mortgagee gets an intangible right for the purpose of securing the payment of debt or the performance of an engagement which may give rise to a pecuniary liability. Only the owner, i.e., the mortgagor, can transfer the property itself, subject to the interest which he has transferred to others, out of the totality of his rights which constitute the ownership. The auction sale held thereafter did not effect the title of the plaintiff who was not a party thereto. He is, therefore, entitled to the reliefs sought for. - **Medar Nagamma and Others v Medar Sanna Siwnna and Others, ILR 1992 Kar. 650.**

SUIT TO DECLARE MORTGAGE VOID

Mortgage is a completed transaction and hence suit to declare a mortgage void for want of consideration does not lie. - **Siddanna Bovi v Hanumantha Reddy, 1971(2) Mys. L.J. 62: AIR 1972 Mys. 23.**

HYPOTHECATION UNDER LAW

Court in case of Indian Oil Corporation v. NEPC India Limited MANU/SC/3152/2006 : (2006) 6

SCC 736 described the meaning of hypothecation as follows:The following definitions of the term 'hypothecation' in P. Ramanatha Aiyar's Advanced Law Lexicon [3rd Edn. (2005), Vol. 2 pp. 2179 and 2180] are relevant: "Hypothecation--It is the act of pledging an asset as security for borrowing, without parting with its possession or ownership. The borrower enters into an agreement with the lender to hand over the possession of the hypothecated assets whenever called upon to do so. The charge of hypothecation is then converted into that of a pledge and the lender enjoys the rights of a pledge.

"Hypothecation' means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor, without delivery of possession of the movable property to such creditor, as a security for financial assistance and

includes floating charge and crystallization of such charge into fixed charge on movable property. [Borrowed from Section 2(n) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002]."

Eureka Forbes Limited vs. Allahabad Bank and Ors. 2010 (6) SCC 193 Physical domain over the hypothecated goods is no way a sine qua non for enforcing Bank's rights against the borrower. It was obligatory upon the appellant to deal with the goods only with the leave and permission of the Bank. Absence of such consent in writing would obviously result in breach of Bank's rights.

MORTGAGE FOR SECURING LOAN EXPLAINED

K. Amarnath v Smt. ' Puttamnw, 2000(4) Kar. L.J. 55E.

A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. On the other hand, a lease is a transfer of a right to enjoy a property and is not a transfer of an interest in a property and the usufruct of the property belongs to the tenant till the determination of the lease. Once there is a debt with security of the property for its redemption, then the arrangement is

a mortgage. Where the relationship between parties was described as creditor and debtor and the debtor gave his property as security for the amount advanced, the document was a mortgage. In other words, if the money paid is a loan advanced and the transfer of possession is for the purpose of security for the repayment of such loan, the transaction would be a usufructuary mortgage. Merely because an amount is advanced and possession is delivered, a transaction will not become a mortgage. In a lease for money advanced or deposit made, there is no relationship of debtor and creditor between the landlord and tenant. In such a transaction, the tenant who desires to take the premises on lease, agrees to make a deposit, instead of making a monthly payment as rent, with the understanding that the landlord will continue to hold the said advance or deposit so long as the tenant continues in possession and he should refund the same when the tenant vacates the leased premises. It may be noticed that in such a transaction, the property is not given up security for the amount advanced. While the primary transaction in a mortgage is advancing of a loan and securing the advance by an immovable property, in a lease against deposit, the primary intention is to make „. available the premises to the tenant and receive the consideration therefor by way of interest free advance. The very fact that the respondent approached the owner requesting him to make available the premises for her residence and agreed to pay a consideration of

Rs. 10,000/- as deposit to be held during the period of occupation and refundable on vacating the premises and the fact that there is no reference to a request for any loan or the premises being held as a security for the amount discloses that the document was a lease for deposit/advance, and not an usufructuary mortgage. Therefore, the description of the document as 'Bhogyada Kararu' (usufructuary mortgage agreement) is misleading and not correct.

RIGHT TO RECOVER MONEY BY SALE OF THE PROPERTY

Nagabhusappa v Laxminarayana, ILR 1985 Kar.

1742. A mortgage is a transfer of an interest in specific immovable property as security for the repayment of a debt. In a simple mortgage what is transferred is a power of sale which is one of the component rights that make up the aggregate of ownership. The characteristic feature of mortgage is that the right in the property created by the transfer is accessory to the right to recovery the debt. It is thus a matter of construction whether the security is a simple mortgage. For a simple mortgage there must be a personal covenant either express or implied and in the absence of such a covenant the security is generally but not necessarily a charge. ... When a deed gives a mortgagor the option of repaying the loan by selling the mortgaged property, that does not exclude the personal covenant in cases where there is one. Therefore, in a simple mortgage the security for the

debt is two-fold: (1) the personal obligation, and (2) the property.... Though there may not be any specific averment in the deed stating that the interest in the property is transferred, when the right to recover money by sale of the property is given to the creditor, impliedly it amounts to transfer of an interest in the property.

MORTGAGE FOR LOAN RECOVERY AND WHERE RENTAL PAYMENT ALSO MENTIONED

Mahant Ramdhan Puri v Bankey Bihari Saran and Others, 1958 Mys. L.J. 775 (SC)

The executant of the document owed large sums of money to the other party and the document provided the manner of discharging the debt, namely, that during the subsistence of an existing lease, the other party should receive the rent from the lessees and appropriate a certain sum on account of interest and pay a sum of Rs..... as rent to the executant and that after the expiry of the existing lease, the other party should take physical possession of the land and appropriate the produce towards interest and pay Rs. as rent to the executant and that on the expiry of 15 years, the executant would pay the entire principal amount to the other party. The document also declared that the property was given as security for the loan. (1) Under the document, there was a relationship of creditor and debtor between the parties and the property was given as security for the

payment of the amount advanced with interest and therefore, the document was a mortgage and not a lease; and

(2) Under the deed the mortgagee undertook an unconditional obligation to pay the rent and had the right to take the entire receipts from the land in lieu of interest; therefore there was a contract between the mortgagee and mortgagor within the meaning of Section 77 of the Act, to the effect that the receipts from the mortgaged property should be taken in lieu of interest: and the mortgagee was not liable to render accounts to the mortgagor. The mention of a specific rate of interest in the document does not necessarily lead to the conclusion that the mortgagee would have to take only such parts of the net receipts sufficient to discharge the interest and credit the balance to the mortgagor. It cannot be held from the mere fact that the rate of interest is mentioned, that the document does not come under the purview of Section 77.

INSTEAD OF MAKING MORTGAGE DEED FOR LOAN SOME MAKE SALE AGREEMENTS TO MAKE PRESSURE - THIS DEPRIVES DEBTOR OF HIS RIGHT

Court in Smt. Indira Kaur and others vs. Shri Sheo Lal Kapoor (AIR 1988 SC 1074, 1988 (1) SCALE 598, (1988) 2 SCC 488), which are repeated below, become relevant :- ".....there is an increasing tendency in recent years to enter into such transactions in order to deprive the debtor of his right

of redemption within the prescribed period of limitation. In fact very often the mortgagee in place of getting a mortgage deed executed in lieu of a loan obtains an agreement to sell in his favour from the mortgagor so as to bring pressure on the mortgagor by seeking to enforce specific performance to enable the mortgagee to obtain possession of the property for an amount smaller than the real value of the property....."

In U. Nilan vs. Kannayyan (Dead) Through LRs. JT 1999(7) SC 621 = 1999(8) SCC 511, Court observed as under : "Adversity of a person is not a boon for others. If a person in stringent financial conditions had taken the loan and placed his properties as security therefor, the situation cannot be exploited by the person who had advanced the loan. The Court seeks to protect the person affected by adverse circumstances from being a victim of exploitation. It is this philosophy which is followed by the Court in allowing that person to redeem his properties by making the deposit under Order 34 Rule 5 C.P.C."

MORTGAGE COMPULSORILY REGISTRABLE

A document of mortgage is compulsorily registrable. If not registered, the deed can only be used to evidence debt. AIR 1964 Pat 241.

Ramlingappa v Gajendra Rao, 1997(3) Kar. L.J. 347.

In a suit for redemption, a condition precedent is that there should be a registered mortgage deed evidencing the mortgage of immoveable property for a sum of Rs. 100/- or upwards secured as mortgage money evidencing the mortgage as contemplated under Section 59 of Transfer of Property Act. ... A mortgage does not become complete and enforceable until it is registered as contemplated under the law as above and that if it is not registered, it cannot operate as a mortgage. In the instant case, the position of the respondent is no way better than a trespasser and the best course that was open to the respondent was to sue the appellant on his title instead of resorting to redemption suit, for the provision in Section 59 of the Transfer of Property Act is essentially a rule of law and not a rule of evidence. It is not the case of the respondent that the original of Ex. P-10 was a registered mortgage deed compulsorily registrable under Section 59 of the Transfer of Property Act and Section 17 of the Registration Act. Obviously, there is no worth document produced by the respondent before the learned City Civil Judge to be evidenced as mortgage and as such, institution of the very suit by the respondent for redemption of mortgage is totally misconceived.

MORTGAGE BY DEPOSIT OF TITLE DEEDS

V.E.R.M.A.R. Chettyar Firm v. Ma Joo Teen ((1933) I.L.R. 11 Rang. 239, 253.). The main question decided in that case was, what did the terms "documents of title" and "title-deeds" denote? The Court held that they denoted such a document or documents as show a prima facie or apparent title in the depositor to the property or to some interest therein. But what is relevant for the present purpose is that the learned Chief Justice, who spoke for the Court, after considering the leading judgments on the subject, observed: "If the form of the documents of title that have been delivered to the creditor is such that from the deposit of such documents alone the Court would be entitled to conclude that the documents were deposited with the intention of creating a security for the repayment of the debt, prima facie a mortgage by deposit of title-deeds would be proved; although, of course, such an inference would not be irrebuttable, and would not be drawn if the weight of the evidence as a whole told against it."

JUSTICE SUBBARAO, K. AND JUSTICE MUDHOLKAR, J.R. of The Supreme Court of India in the case of K.J.Nathan vs S. V. Maruty Reddy And Others 1965 AIR 430, 1964 SCR (6) 727

1. Under the Transfer of the Property Act, a mortgage by deposit of title deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be

advanced by way of loan. Therefore, such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property under Section 58(f) of the Transfer of Property Act. The three requisites of a mortgage by deposit of title deeds are, (i) debt, (ii) deposit of title deeds, and (iii) an intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided on the basis of the evidence. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But a court may presume under section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed.

2. Physical delivery of documents by the debtor to the creditor is not the only mode of deposit. There may be a constructive deposit. A court will have to ascertain in each case whether in substance there is a delivery of the title deeds by the debtor to the creditor. If the

creditor was already in possession of the title deeds, it would be hypertechnical to insist upon the formality of the creditor delivering the title deeds to the debtor, and the debtor re- delivering them to the creditor. What would be necessary in these circumstances is whether the parties agreed to treat the documents in the possession of the creditor or his agent as delivery to him for the purpose of the transaction.

Justice G Mitter, Justice P J Reddy, Justice S.M.Sikri of Supreme Court of India in the case of Deb Dutta Seal vs Ramanlal Phumra And Ors. Reported in AIR 1970 SC 659, (1969) 3 SCC 821,

The cases on this point are legion but the principles of law have been stated over and over again in various decisions of the Judicial Committee of the Privy Council and of this Court, not to speak of the innumerable decisions of various High Courts. The principles of law are quite clear and were summarised as follows in *Pranjivandas Mehta v. Chan Ma Phee*, 43 Ind App 122 at p. 125 : AIR 1916 PC 115 at p. 116:

(1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title.

(2) Where, however, titles are handed over accompanied by a bargain, that bargain must Rule.

(3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security.

The judges have evolved following propositions of law after citing so many precedents:-

- (a) The facts and circumstances attendant on the deposit of title deeds and the execution of the memorandum must be considered as a whole.
- (b) If the transaction of deposit of title deeds with intent to create a security be completed before the parties have a memorandum, registration of the document is not required unless as in Hari Sankar Paul's case (supra) the parties proceed to create a mortgage over again in writing.
- (c) The form and text of the memorandum although of paramount importance are not conclusive.
- (d) If the memorandum does not contain all the terms necessary to give it efficacy as a contract of mortgage no registration is necessary.
- (e) If the evidence shows that the memorandum was executed with the intention that it should be the repository of the bargain between the parties then the document alone can be looked into. In the absence of registration, the bargain cannot be proved.
- (f) The deposit of title deeds contemporaneously with the execution of the memorandum containing the terms of mortgage gives a strong indication of the document being considered as the bar gain between the parties.

Rajamma v Mahant P. Krishnanandagiri, Goswamy, AIR 1973 Mys. 310. Plaintiff advanced a loan on the defendant executing a promissory note.

Defendant deposited the title deeds relating to the suit property and handed over the letter referring to the equitable mortgage. The letter which contained a mere record of the events and did not contain the terms of the transaction, did not require registration. The essential question to be considered is whether the parties really intended that the document alone should constitute evidence of the transaction.

State Bank of Mysore v Kotagi Eswarappa, 1963

Mys. L.J. Supp. 121. The law does not require an actual physical delivery of the title deeds in order to create a mortgage. Even constructive delivery with intent to create security would be sufficient. If the documents have already been delivered to the lender either for the purpose of security of title or by way of safe custody or for any other purpose, it is open to the parties to create a mortgage by clear understanding between them and a clear declaration of intention by the borrower that the documents may be held by the lender as security for the loan advanced by him.

State Bank of Mysore, v M/s. S.M. Essence Distilleries 1993 (2) Kar. L.J. 649 (DB).

To create a valid mortgage by deposit of title deeds, there must be a delivery of the title deeds relating to an immovable property by the debtor, to a creditor or his agent, in a notified town with the intention to create a security thereon. In this case, the fact that the title deeds (Exs. P. 29 to P. 60) relating to the plaint schedule

properties were delivered by the 4th defendant to the Bank on 17-1-1980 at Mysore which is a notified town and the fact that the delivery of such title deeds was with an intention to create a security on such title deeds for the amount advanced/agreed to be advanced on 16-1-1980, are not disputed. An equitable mortgage of a property which lies outside the territories of notified towns, can be validly created by delivering the documents of title to the creditor or his agent in a notified town. It is now well-settled that no memorandum or writing is necessary to create an equitable mortgage by deposit of title deeds. The equitable mortgage was complete by delivery of the documents with an intention to create security thereon. However, execution of a memorandum or document in regard to deposit of title deeds is not prohibited. If however the equitable mortgage is created by execution of the memorandum or if the memorandum embodies the bargain between the parties, then it will be liable for Stamp duty under Article 6 of the Schedule to the Karnataka Stamp Act and will also require registration. But if the memorandum or document is executed subsequent to the creation of the equitable mortgage, merely in confirmation of or as a record of the transaction, it neither attracts Stamp duty under Article 6 nor requires registration. The terms of the document itself and the surrounding circumstances will have to be looked into to find out whether the document is to be taken as embodying the express bargain between the

parties or merely evidential in nature. Territorial restriction referred to in Section 58(f) has reference only to the delivery of the documents of title and not to the situation of the property mortgaged. Thus in regard to the plaint schedule properties situated in Srirangapama Taluk, an equitable mortgage can be created at Mysore which is a notified town. Once the mortgage is created in a notified town, the registration of the memorandum can be either at the town where the equitable mortgage is created or in the office of Sub-Registrar within whose jurisdiction, the mortgaged properties are situated. As long as the memorandum merely confirms an equitable mortgage already created in a notified town, the registration of the memorandum even outside the notified towns, will be valid.

(i) Whether a valid mortgage can be created by depositing in a notified town - The title deeds relating to a property situated outside the notified town

(ii) Where a deposit of title deeds is made on a particular day with intent to create security thereon - Whether a subsequent execution and registration of a memorandum supersedes it

(iii) If the memorandum confirming the deposit in a notified town is registered in a non-notified town - Does it invalidate the equitable mortgage already created

(iv) Whether such a memorandum attracts stamp duty under Article 6 of the Schedule to Karnataka Stamp Act.

In the ruling Veerammal v. K.R.L. Lakshmanan Chettiar AIR 1960 Mad 529 in para 4 Hon'ble Madras High Court has observed that:

Both the Courts came to the conclusion that the delivery of the title-deeds was made personally by the husband (defendant No. 1) on behalf of himself and his wife, that the delivery of the documents was to a creditor, that the documents were title-deeds relating to immovable properties in regard to which an equitable mortgage could be created, that the delivery was with intent to create a security thereon, that no maximum amount for the security need be fixed, and that the story of the defendants about the husband double-crossing the wife or about the title-deeds and other documents being entrusted to the plaintiffs clerk P.W. 1 and their being not returned and the plaintiff exploiting them for putting forward an equitable mortgage was totally false.

In para 8 of this ruling the requisites of the equitable mortgage by deposit of title-deeds are given as under:

- (i) There must be a debt;
- (ii) Delivery must be by a debtor or his agent;
- (iii) Delivery must be in the towns mentioned in the Act;
- (iv) Delivery must be to a creditor or his agent;
- (v) Delivery must be of the documents of title to immovable property; and
- (vi) Delivery must be with intent to create a security thereon.

JUSTICE SUBBARAO, K. AND JUSTICE MUDHOLKAR, J.R. of The Supreme Court of India in the case of K.J.Nathan vs S. V. Maruty Reddy And Others 1965 AIR 430, 1964 SCR (6) 727 “.....under the Transfer of Property Act a mortgage by deposit of title deeds is one of the modes of creating a legal mortgage whereunder there will be transfer of interest in the property mortgaged to the mortgagee. This distinction will have to be borne in mind in appreciating the scope of the English decisions cited at the Bar. This distinction is also the basis for the view that for the purpose of priority it stood on the same footing as a mortgage by deed. Indeed a proviso has been added to s. 48 of the Registration Act by Amending Act 21 of 1929. It says: "Provided that a mortgage by deposit of title deeds as defined in section 58 of the Transfer of Property Act, 1882, shall take effect against any mortgage-deed subsequently executed and registered which relates to the same property."

JUSTICE SUBBARAO, K. AND JUSTICE MUDHOLKAR, J.R. of The Supreme Court of India in the case of K.J.Nathan vs S. V. Maruty Reddy And Others 1965 AIR 430, 1964 SCR (6) 727 “.....Transfer of Property Act a mortgage by deposit of title- deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore,

such a mortgage of property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are, (1) debt, (ii) deposit of title-deeds; and (iii) an intention that the deeds shall be security for the debt.”

JUSTICE SUBBARAO, K. AND JUSTICE MUDHOLKAR, J.R. of The Supreme Court of India in the case of K.J.Nathan vs S. V. Maruty Reddy And Others 1965 AIR 430, 1964 SCR (6) 727 “10.Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumptions and on oral, documentary or circumstantial evidence. There is no presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But a court may presume under S.114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title deeds to be in force till the mortgage deed was executed.....”

STRANGERS RIGHTS AND OBJECTIONS TO DECRETAL PROPERTY

Sameer Singh vs. Abdul Rab (14.10.2014 - SC) :
MANU/SC/0924/2014 **QUOTES** Brahmdeo

Chaudhary v. Rishikesh Prasad Jaiswal and Anr.
MANU/SC/0191/1997 : AIR 1997 SC 856 wherein a two-Judge Bench scanning the anatomy of the rules came to hold that: ...a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order XXI, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree

can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him.

TRANSFEREE PENDENTLITE CANNOT OBSTRUCT DECREE

The Apex Court in Silverline Forum Pvt. Ltd. v. Rajiv Trust and Anr. MANU/SC/0252/1998 : AIR 1998 SC 1754, while considering a similar plea raised by a sub-tenant has held thus: No doubt if the resistance was made by a transferee pendente lite of the judgment debtor, the scope of the adjudication would be shrunk to the limited question whether he is such transferee and on a finding in the affirmative regarding that point the execution Court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.

DECREE WHICH CAN BE CHALLENGED AT EXECUTION STAGE

Smt. Nancy Pais W/o Pascal Rebello vs. Sri S. Surendra S/o late S.V. Srinivasaiah and (30.03.2009 - KARHC) : MANU/KA/0846/2009

QUOTES:- The Apex Court in *Kiran Singh and Ors. v. Chaman Paswan and Ors.* MANU/SC/0116/1954 : AIR 1954 SC 340 has held that a defect of jurisdiction whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties.

In *Sunder Dass v. Ram Prakash* MANU/SC/ 0368/ 1977 : (1977) 2 SCC 662, the Apex Court has held that Execution Court can go behind the decree if it is pleaded that the decree was a nullity by the reason of Court passing it lacking inherent jurisdiction to pass it

In *Balvant N. Viswamitra and Ors. v. Yadav Sadashiv Mule (dead) through LRs. and Ors.* MANU/SC/0625/2004 : (2004) 8 SCC 706, the Apex Court has drawn a distinction between 'void' decree and 'illegal, incorrect or irregular' decrees. It is held that a void decree can be challenged at any stage even in execution or collateral proceedings. On the other hand, an erroneous or illegal decision, which is not void, cannot be objected to in execution or collateral proceedings.

WHEN A PROPERTY IS SOLD IN PUBLIC AUCTION IN PURSUANCE OF AN ORDER OF THE COURT AND THE BID IS ACCEPTED AND THE COURT

CONFIRMS THE SALE IN FAVOUR OF THE PURCHASER, THE SALE BECOMES ABSOLUTE AND THE TITLE VESTS IN THE PURCHASER

B. Arvind Kumar vs. Government of India and Others, (2007) 5 SCC 745, the Supreme Court, after

referring to Section 17(2)(xii) of the Registration Act, held that when a property is sold in public auction in pursuance of an order of the court and the bid is accepted and the court confirms the sale in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser. The relevant portion of the judgment of the Supreme Court is as under: "10. ... When a property is sold by public auction in pursuance of an order of the court and the bid is accepted and the sale is confirmed by the court in favour of the purchaser, the sale becomes absolute and the title vests in the purchaser. A sale certificate is issued to the purchaser only when the sale becomes absolute. The sale certificate is merely the evidence of such title. It is well settled that when an auction purchaser derives title on confirmation of sale in his favour, and a sale certificate is issued evidencing such sale and title, no further deed of transfer from the court is contemplated or required. In this case, the sale certificate itself was registered, though such a sale certificate issued by a court or an officer authorized by the court, does not require registration. Section 17(2)(xii) of the Registration Act, 1908 specifically provides that a certificate of sale granted to any purchaser of any property sold by a public

auction by a civil or revenue officer does not fall under the category of non testamentary documents which require registration under Sub-section (b) and (c) of Section 17(1) of the said Act. We therefore hold that the High Court committed a serious error in holding that the sale certificate did not convey any right, title or interest to plaintiff's father for want of a registered deed of transfer."

RIGHT TO REDEMPTION

Lakshminarasamma and Ors. vs. C.V. Raghavachar and Ors. AIR 1976 Kant 209 : MANU/KA/0068/1976 - The puisne mortgagee has a right to redeem the prior mortgage. If he does so he acquires the rights of the prior mortgagee also. But the mortgagor can exercise his right of redemption against every one of the mortgagees. Such a right can be defeated by the mortgagee only by foreclosure. At any time before foreclosure the mortgagor can always exercise his right to redeem. Though the puisne mortgagee can redeem the prior mortgage he cannot deprive the purchaser in the prior mortgagee's suit of the right of redemption since the right of redemption which belonged to the original mortgagor has vested in the purchaser in the prior mortgagee's suit. Hence the puisne mortgagee cannot have a priority to redeem as against the purchaser in the prior mortgagee's suit. The purchaser in the puisne mortgagee's suit cannot

have a better right than the puisne mortgagee himself. Hence, as between the two purchasers it is only the purchaser in the prior mortgagee's suit who has priority of right of redemption. In the present case the suit brought by C. K. Srinivasa Murthy is not one for redemption, But in O. S. No. 889 of 1962, the suit brought by C. V. Raghavachar, the legal representatives of C, K. Srinivasa Murthy have urged their preferential right to redeem the plaintiffs in that suit in the alternative. Hence, in the Present case also it is not desirable to drive the parties to another suit and it is desirable to determine the Priority as between the rights of redemption claimed by the rival purchasers. Since the prior mortgagee had become the owner of the equity of redemption of the mortgagor even before the suit was brought by the puisne mortgagee, Dattu Rao, the purchaser in the puisne mortgagee's suit cannot resist the right of redemption sought to be exercised by the Purchaser in the prior mortgagee's suit and his representative in interest viz., C. K. Srinivasa Murthy. Since the equity of redemption of the mortgagor vested in the purchaser at the earlier sale in the prior mortgagee's suit and since all the mortgagee are simple mortgages the habit to possession also got transferred to the purchaser in the prior mortgagee's suit.

Quoted citations

In the Law of Mortgage by Sir Rashbehary Ghose, Fifth Edition, Vol. 1, 1922 at Page 625, the passage from Jones has been extracted. It is as

follows: "When a Party in interest," says Jones, "Other than the owner of the equity of redemption, is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons interested in the equity who are made parties. The sale vests the estate in the purchaser subject to redemption by the person interested in it who was not made a party to the proceedings. His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have the sale set aside by intervening by petition in the foreclosure suit. His only right is the right of redemption. The sale, though it fails to be effectual in every other respect, operates as an assignment of the mortgage and all the mortgagee's rights to the purchaser, who may Proceed de novo to foreclose". With regard to priority as between the two rival purchasers it has been stated at page 659 as follows:- "I may here observe, in passing, that as between two rival purchasers the title to the outstanding equity of redemption is determined by the Priority not of the respective mortgages but of the respective sales; and the person who first buys the equity of redemption, whether he is the mortgagee himself or a stranger, will be entitled in his character of transferee to redeem all subsisting mortgages on the property, and thus acquire an absolute title to it."

In N. A. Singalachar v. Thimme Gowda alias Anne Gowda ((1938) 16 Mys LJ 49) the dispute was between rival Purchasers of the same property in

mortgage suits brought by the respective simple mortgagees without impleading each other. The prior mortgagee had sued and Obtained a decree and in execution had purchased the property before the subsequent mortgagee preferred his own suit. It was held that the priority of the date of purchase of the mortgagor's right to Possession gives priority of title to Possession in disputes between rival purchasers of the same -property in mortgage suits brought by the respective mortgagees without impleading each other and that the mortgagee who purchased the -property earlier is entitled to remain in possession until the rights of parties are worked out in a -pro-per suit in which all persons interested are parties. It was held that a puisne mortgagee or a representative in interest of his is certainly entitled to redeem the prior mortgage. But that a purchaser in execution of a decree on the prior mortgage can, apart from holding out the prior mortgagee as shield against the puisne mortgagee or his representative in interest, claim as the owner of the equity of redemption to redeem the puisne mortgage.

If the two rights to redeem, viz., the right of the puisne mortgagee to redeem the prior mortgagee and the right of the prior mortgagee as assignee of the equity of redemption to redeem the puisne mortgagee, conflict, the right of the prior mortgagee to redeem the puisne mortgagee was held to take priority, following 75 Ind Cas 899 : AIR 1924 Na-a 198 and MANU/UP/0195/1925 : AIR1925All804 . The

decision in (1908) 8 CLJ 173, which takes a contrary view, was not followed. Since the offer to redeem came from the purchaser in the decree of the first mortgage and since both the purchasers were on record, it was held desirable to adjust the equities between parties instead of allowing them to fight out the matter in a subsequent suit.

In Sebastian D'Cruz v. Laxman Shreepad (MANU/MH/0092/1973 : AIR 1973 Bom 300) the prior mortgagee had brought to sale the mortgaged property and purchased it himself. But he had not made the puisne mortgage a party to his suit. The prior mortgagee was held entitled, as assignee of the equity of redemption, to redeem the puisne mortgagee and that the original mortgagor lost his right to redeem since the prior mortgagee who had purchased the mortgaged property as auction purchaser had purchased his right to redeem the puisne mortgage.

The decision in (1938) 16 Mys LJ 499 applies to the facts of the present case also. The sale in execution of the decree obtained by the prior mortgagee had taken place before the suit by the puisne mortgagee was instituted. The -purchaser in the prior mortgagee's suit obtained the rights of the prior mortgagee as well as the rights of the original mortgagor as on the date of his suit. The rights of the original mortgagor included the right to redeem the puisne mortgagee. The purchaser in the puisne mortgagee's suit obtained the rights of all the subsequent mortgagees. But he obtained them

subject to the rights of the original mortgagor or his assignee. Though the original mortgagor had been impleaded in the puisne mortgagee's suit all the rights of the mortgagor had been by then transferred to the purchaser in the prior mortgagee's suit.

The puisne mortgagee has a right to redeem the prior mortgage. If he does so he acquires the rights of the prior mortgagee also. But the mortgagor can exercise his right of redemption against every one of the mortgagees. Such a right can be defeated by the mortgagee only by foreclosure. At any time before foreclosure the mortgagor can always exercise his right to redeem. Though the puisne mortgagee can redeem the prior mortgage he cannot deprive the purchaser in the prior mortgagee's suit of the right of redemption since the right of redemption which belonged to the original mortgagor has vested in the purchaser in the prior mortgagee's suit. Hence the puisne mortgagee cannot have a priority to redeem as against the purchaser in the prior mortgagee's suit. The purchaser in the puisne mortgagee's suit cannot have a better right than the puisne mortgagee himself. Hence, as between the two purchasers it is only the purchaser in the prior mortgagee's suit who has priority of right of redemption.

MORTGAGE WHEN ORIGINAL IS LOST

Even though S.58(1) of the Transfer of Property Act contemplates deposit of the original title deeds for creation of equitable mortgage, when the original

document is lost or not forthcoming, equitable mortgage can be created by depositing certified copy of the document. In the decision reported in *Assiamma v. State Bank of Mysore* (ILR 1992 Kerala 43, AIR 1990 Ker 157), a Division Bench of Kerala High Court has held that when the original documents are not forthcoming or lost, equitable mortgage can be created by depositing copies of the document.

AIR 1982 Andhra Pradesh 272 (Kanigalla Prakasa Rao vs. Nanduri Ramakrishna Rao and others)

“..... The owners of property who have so their documents of title will, therefore, be not in a position to deliver such original documents with intent to create an equitable mortgage. It will be rather anomalous if such persons can validly execute registered documents of sale, lease and mortgage, but will not be entitled to raise any monies by creating an equitable mortgage. If the original title deeds are lost, we do not see why the owner of the property should not be in a position to an equitable mortgage. The mortgagee in such cases has only to be vigilant in accepting such representation made to him and should make the necessary enquiries before agreeing to advance any monies on the basis of registration extracts of documents of title or copies of documents. That seems to be the underlying principle behind S.78 of the Transfer of Property Act which provided that if the conduct of a prior mortgagee amounted to gross

neglect, the mortgage in his favour will be postponed to the subsequent mortgagee.”

AIR 1974 Madras 16 (V.61, C.8) (Angu Pillai and others vs. M.S.M.Kasiviswanathan Chettiar and others

16. The decision of the Rangoon High Court in AIR 1933 Rang 299 upon which the trial Judge relied was overruled by a Full Bench of the Rangoon High Court in Chidambaram Chettyar v. Aiz Mean, AIR 1938 Rang 149 (FB). This Full Bench decision unfortunately does not appear to have been brought to the notice of the trial Judge. The Full Bench has reviewed the English and Indian authorities and has pointed out that in order to create a valid mortgage, it is not necessary that the whole, or even the most material of the documents of title to the property should be deposited; nor that the documents deposited should show a complete or good title in the depositor and it is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating a security thereon.

Venkataramayya v. Narasinga Rao (1911) 21 Mad

LJ 454 in support of his argument that even the deposit of sale deed in certain circumstances would not be sufficient to create an equitable mortgage. In that case, the debtor deposited a sale deed in the name of his father who had made a gift of the property in favour of his grandson by a deceased son. The

property was admittedly the self acquired property of the father of the first defendant in that case. The question arose whether the deposit of that sale deed was sufficient to constitute a valid equitable mortgage. The Bench pointed out that the only document that was deposited did not show any kind of title in the depositor to the property as it was not a sale deed in his name but was a sale deed in the name of his father and that, therefore, no valid equitable mortgage was created.

AIR 2002 Madras 378 (M.M.T.C.limited vs. S.Mohamed Gani and another) “..... In

order to prove the existence of an equitable mortgage, the following requisites are necessary: 1. A debt, 2. a deposit of title deeds and 3. an intention that the deeds shall be security for the debt. The debt may be an existing debt or a future debt. The debt may be an existing debt or a future debt. Insofar as the deposit of title deeds is concerned, physical delivery of document is not the only mode of deposit and even the constructive delivery has been held sufficient. It is sufficient if the deeds deposited bona fide relate to the property or are any material evidence of title and are shown to have been deposited with an intention to create a security thereon. The essence of the whole transaction of equitable mortgage by deposit of title deeds is the intention that the title deeds shall be the security for the debt. Whether the said requisite intention is available in a given case is a question of

fact and has to be ascertained after considering the oral, documentary and circumstantial evidence. It is true the mere fact of deposit does not raise the presumption that such an intention existed. Such an intention cannot be presumed from the possession since the mere possession of the deeds is not enough without evidence as to the manner in which the possession originated, so that an agreement may be inferred. Even the mere possession of the deeds by the creditor coupled with the existence of a debt need not necessarily lead to the presumption of a mortgage. The mere fact that the documents were coming from the custody of the plaintiff is not by itself sufficient to prove an intent to create a security. But in a given case unless and until the defendants satisfactorily explain how the documents came to the plaintiffs custody the said fact would be insignificant and have a great bearing”.

WHAT IS MEANT BY DOCUMENTS OF TITLE

Division Bench of Kerala High Court in Syndicate Bank v. Modern Tile and Clay Works, 1980 Ker LT 550. In that case, Janaki Amma J. speaking for the Bench said as follows: "By "documents of title" we mean the legal instruments which prove the right of a person in a particular property. Evidence supplied by documents may in some Cases be conclusive while in other cases it may be insufficient in proving the title or the right claimed. When a person who is acclaimed

and recognised by law as the owner of property transfers his rights by an instrument which satisfies all the requirements of law, the instrument of transfer is a title deed in respect of the property so far as the transferee is concerned. The document may amount to conclusive proof of such transfer. On the other hand a document may be of such a kind that it tends to prove such transfer of right but is not conclusive of a transfer of ownership. Thus a receipt for payment of revenue may not be conclusive proof of the ownership of the person in whose name it is issued even though the liability to pay revenue is on the owner. This is because in practice revenue is received by the concerned authorities from a person even without an enquiry whether he is the owner of the property. A revenue receipt is therefore insufficient evidence to prove title to property and is therefore not by itself a document of title.....A parity of reasoning applies in the case of a copy of deed of transfer. A copy of a deed of transfer is not ordinarily a document of title for the purposes of an equitable mortgage. It is the original deed of transfer that is the document of title. This is because the rules for the issue of copies permit the obtaining of copies by an owner even while he is in possession of the original document of title. To hold that a copy of a deed of transfer is also a document of title for purposes of Section 58(f) of the Transfer of Property Act would amount to giving facilities to the owner to misuse the provision. He may get an advance from one person by delivering the

original document of title and then use the copy of the document for getting an advance from some other who may not be aware of the earlier equitable mortgage. It should be the policy of law to see that such contingencies are avoided. At the same time there may be cases where the original document is lost and there are no chances of that document being made use of for any purpose. In the absence of the original deed of transfer the next best evidence of the owner's title to the property is a certified copy of that document. A certified copy in such cases may with sufficient safeguards be received as a document of title. The essential prerequisite for the use of a certified copy as a document of title is the loss of the original deed. Unless and until it is made out that the original is lost, a certified copy of a document cannot be considered to be a document of title for the purpose of Section 58(f) of the Transfer of Property Act.

WHAT DOCUMENTS OF TITLE NEED TO BE DEPOSITED

A Full Bench of the Rangoon High Court considered the question in K.L.C.T. Chidambaram Chettiyyar v. Aziz Meah, AIR 1938 Rang 149.

Justice Dunkley, who delivered the main judgment observed as follows: "In our opinion the correct statement of the law is that in order to create a valid mortgage by deposit of title deeds under Section 58(f), T.P. Act, it is not necessary that the whole, or even the

most material of the documents of title to the property should be deposited, nor that the documents deposited should show a complete or good title in the deposition. It is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating a security thereon" Roberts C.J. agreed with the main judgment and Mya Bu J added as follows : "The documents enumerated in my learned brother's judgment, in my opinion, show prima facie or apparent title of the mortgagors to the land covered by those documents. The grant shows that the original owner of the property was the mortgagors' vendor. The certificate of transfer shows the factum of the transfer having taken place about 14 years before the alleged mortgage. Although it is not a valid document of conveyance, yet it is useful as showing that a transfer as a matter of fact had taken place. Then there were tax tickets or revenue receipts, which showed that during the years that elapsed between the transfer and the alleged mortgage the mortgagors were paying the revenue as persons who owned the land In these circumstances in my opinion, the documents enumerated in my learned brother's judgment are sufficient to show that there was prima facie title in the mortgagors to the property mentioned in the documents."

**DEEDS DEPOSITED SHOULD BONA FIDE RELATED
TO PROPERTY IS ENOUGH**

Angu Pillai v. M.S.M. Kasiviswanathan Chettiar, AIR 1974 Mad 16. The Court relied on the Full Bench decision of the Rangoon High Court in Chidambaram Chettiar's case (supra) and held that it was not necessary that the whole, or even the most material of the documents of title to the property should be deposited; nor that the documents deposited should show a complete or good title in the depositor and it is sufficient if the deeds deposited bona fide, relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating a security thereon.

WHETHER REGISTRATION OF MORTGAGE DEED/ MEMORANDUM NECESSARY

In Rachpal Mahraj v. Bhagwandas Daruka and others 1950 AIR 272, 1950 SCR 548 the Supreme Court dealt with the question of registration of the memorandum given along with the title deeds. Patanjali Sastri, J., (as his Lordship then was) who spoke for the court, stated the law as under :
".....WHEN the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by

their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creating of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under section 17, Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title deeds and yet may not be registrable,".

In United Bank of India v. Lakharam S. & Co. (AIR 1965 SC 159) the Supreme Court examined the question as to whether the memorandum required registration. It held that: "APPLYING the principle to the present case, we consider that the letter at Ex. 7(a) was not meant to be an integral part of the transaction between the parties. The letter does not mention what was the principal amount borrowed or to be borrowed. Neither does it refer to rate of interest for the loan. It is important to notice that the letter does not mention details of title deeds which are to be deposited with the plaintiff-bank. We are, therefore, of the opinion that the view of the High Court with regard to the

construction of Ex. 7(a) is erroneous and the document was not intended to be an integral part of the transaction and did not, by itself, operate to create an interest in the immovable property. It follows, therefore, that the document-Ex. 7(a)-did not require registration under Section 17 of the Indian Registration Act."

In V.G. Rao v. Andhra Bank , AIR 1971 SC 1613

Hegde, J., while dealing with the law relating to the nature of a memorandum given along with the deposit of title deeds or one filed thereafter, held as under : "THEREFORE, the crucial question is : Did the parties intend to reduce their bargain regarding the deposit of the title deeds to the form of a document ? If so, the document requires registration. If on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document being merely evidential does not require registration..... If the parties intend to reduce their bargain: regarding the deposit of title deeds to the form of a document the document requires registration. If on the otherhand its proper construction and the surrounding circumstances lead to the. conclusion that the parties did not intend to do so, then, there being no express. Bargain the contract to create a mortgage arises by

implication of the law from the deposit itself with the requisite intention, and the document being merely evidential does not require registration. "

In United Bank of India, Ltd. V. Lekharam Sonaram and Co., AIR 1965 SC 1591, , Ramaswami J.,

speaking for the Court, observed- "When the debtor deposits with the creditor title deeds of his property with an intent to create a security the law implies a contract between the parties to create a mortgage and no registered instrument is required under section 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration under section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one

hundred rupees and upwards, If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either."

In the decision reported in **Veeramachineni Ganghadhara Rao v. Andhra Bank Ltd (AIR 1971 SC 1613)**, it was held as follows : "From the recitals of Ext.A6, it is seen that the memorandum in question was intended to 'put on record' the terms already agreed upon. That being the case, the document cannot be considered as a contract entered into between the parties. If the parties intended that it should embody the contract between them, it would have been necessary to register the same under Section 17 of the Registration Act, 1908."

Satti Venkateswara Reddy vs. Mallidi Venkata Reddy: MANU/AP/0716/2015 - AIR 2016 AP 24 -

In the case in hand, the original deeds have just been deposited with the bank. In the face of it, we are of opinion that the charge of mortgage can be entered into revenue record in respect of mortgage by deposit of title-deeds and for that, instrument of mortgage is not necessary. Mortgage by deposit of title-deeds further does not require registration. Hence, the question of payment of registration fee and stamp duty does not arise. By way of abundant caution and at the cost of repetition we may, however, observe that when the borrower and the creditor choose to reduce

the contract in writing and if such a document is the sole evidence of terms between them, the document shall form integral part of the transaction and same shall require registration under Section 17 of the Registration Act.

The Supreme Court in State of Haryana and others v. Navir Singh and another AIR 2014 SC 339 -

(2014) 1 SCC 105 examined the case of the mortgage by deposit of title deeds and held as follows: 8. Mortgage inter alia means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Section 17(1)(c) of the Registration Act provides that a non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. Mortgage by deposit of title-deeds in terms of Section 58(f) of the Transfer of Property Act surely acknowledges the receipt and transfer of interest and, therefore, one may contend that its registration is compulsory. However, Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument. In the face of it, in our opinion, when the debtor deposits with the creditor title-deeds of the property for the purpose of security, it becomes mortgage in terms of Section 58(f) of the Transfer of Property Act

and no registered instrument is required under Section 59 thereof as in other classes of mortgage. The essence of mortgage by deposit of title-deeds is handing over by a borrower to the creditor title-deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title-deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration under Section 17(1)(c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration.

WHAT LAW APPLICABLE TO DEPOSIT OF TITLE DEEDS

MRS. ROSY GEORGE -vs.- STATE BANK OF INDIA AND OTHERS, A.I.R. 1993 KERALA 184 (D.B)

wherein it was held as follows:- “By virtue of Section 96 of Transfer of Property Act the provisions of simple mortgage are applicable to a mortgage by the deposit of title deeds.”

Section 58F of the Transfer of Property Act, a person may create an equitable mortgage by delivering the title deeds to a creditor or to his agent in respect of the

documents of title to immovable property with an intent to create a security thereon.

Section 68 of the Indian Evidence Act reads as follows:

“68. Proof of execution of document required by law to be attested.--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence”.

Section 59 of the Transfer of Property Act reads as follows: “59. Mortgage when to be by assurance.--

Where the principal money secured is one hundred rupees or upwards, a mortgage [other than a mortgage by deposit of title deeds] can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by [a registered instrument] signed and attested as aforesaid or [except in the case of a simple mortgage] by delivery of the property”.

MORTGAGE EXTENDS TO FUTURE ADDITIONS TO PROPERTY

Umesh Kumar Gupta vs State Of U.P. AIR 2006 All 30, Now it is well settled that a mortgage by deposit of title deeds: in absence of any special terms of

bargain, extends to secure the property to which the title deeds relate. The portion of the instrument which has been quoted above, covers not only the existing property to which the title deeds relate namely those in Schedule I-B but all constructions and additions to the property as may be made in future. Whether constructions to be made future upon the land mortgaged have also been mortgaged is a matter to be decided on the intention of the parties. The instrument makes it explicit that future constructions have also been given in security. The act of deposit of title deeds and the instrument are therefore integral parts of the same transaction.

GUARANTOR IS ALSO A DEBTOR ENTITLED TO CREATE A MORTGAGE

S. 58(a) of the Transfer of Property Act defines what is mortgage as under: "A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability."

In Mulla's Commentary of Transfer of Property Act at Page 361, it is stated that, a mortgage may not only be for a specific sum, but to secure a current account between the parties upto a limit. At page 362 it is stated that, the future debt referred to in the section may be a contingent liability, e.g., a mortgage to

secure the payment of the respondent's costs in an appeal (a) or to further secure a mortgage against the loss of his existing security (b). The author refers to the decisions in *Girindra v. Bejoy* (1898) 26 Cal. 246, *Tokhan Singh v. Girwar*, (1905) 32 Cal. 494 and *Nand Lal v. Dharamdeo*, (1925) 78 IC 457. In this context, it is pertinent to note that the definition refers to an existing or a future debt. A contract of guarantee is defined under S. 126 of the Indian Contract Act, as under: - "A contract of guarantee is a document to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor".

In Union of India v. Raman Iron Foundry, AIR 1974 SC 1265, it has been held that debt includes any liability in respect of any obligation to repay capital sums of annuities and liabilities to any guarantee.

It may be true that, the liability of a guarantor exists only in the event of the Principal Debtor committing default. But, nevertheless, that is an obligation created by the document for the guarantor to discharge the debt in case default is committed. It is a debt arising in future. It may not be a debt in praesenti. But the definition takes into account both the debts in praesenti and the debts in future. The definition of debt in *Webb v. Stenton*, (1883) 11 QBD 518 of Lord Lindley, J. is as follows: ".....a debt is a

sum of money which is now payable or will become payable in the future by reason of a present obligation". There must be debitum in praesenti; solvendum may be in praesenti or in future that is immaterial. There must be, an existing obligation to pay a sum of money now or in future. In *Kesoram Industries v. Commissioner of Wealth Tax*, (1966) 2 SCR 688 = AIR 1966 SC 1370, the Supreme Court observed as follows: "Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable, if we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due."

If we read in that context, a guarantor is also a debtor and, hence, entitled to create a mortgage by deposit of title deeds.

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS MAY BE CREATED BY THE MERE ACT OF DEPOSITING DEEDS OF TITLE OR EVEN EVIDENCE OF TITLE LIKE TAX RECEIPTS

Justice M C Urs, Justice S R Murthy, Justice M Ramakrishna Chief Controlling Revenue ... vs Manager, State Bank Of Mysore **AIR 1988 Kant 1** Equitable mortgage by deposit of title deeds may be created by the mere act of depositing deeds of title or even evidence of title like tax receipts evidencing payment of property tax on immovable properties. It is not necessary to reduce to writing the transfer of

interest in the immovable property by way of security as in the case of other forms of mortgage. If reduced to writing, the creation of equitable mortgage would also attract the same rigour as other mortgages, the stamp duty payment and compulsory registration under the Registration Act. .. Merely because there is a recital about the creation on the same day, viz., March 23, 1982, of a joint mortgage by deposit of title deeds along with other documents in favour of certain institutions including the bank (para. 11 of the instrument under reference), the instrument under reference cannot be construed as a deed of mortgage. Are the securities, the mortgage by deposit of title deeds and the deed of hypothecation both of which do not give possession of the properties to the bank capable of being held as properties ? The answer seems to be in the affirmative.Mortgage of any kind under the Transfer of Property Act is an acquisition of interest in immovable property capable of being transferred in like manner to others and, therefore, the mortgage acquired by the bank jointly constitutes its property and that of the other mortgagees who apparently have agreed that the bank shall hold the title deeds in its possession and as the bank ranks *pari passu* with the other institutions, it is capable of realising its securities in its own right. This is obvious to any reader of the instrument in question.

Murugharajendra Co. v. Chief Controlling Revenue Authority [1974] 1 Kar LJ 177 ; AIR 1974 Kar 60,

has explained when exactly an instrument of equitable mortgage, if at all, is liable to be charged to stamp duty under the Act. After adverting to the definition of the term "instrument" in Section 2(j) of the Act and the decision of the Supreme Court in the case of *United Bank of India Ltd. v. Lekharam Sonaram and Co.* [1965] 35 Comp Cas 471 (SC), this court ruled as follows (at page 62 of AIR 1974 Kar) : " It is clear, from the opinion of the Supreme Court extracted above that a mortgage by deposit of title deeds can be created by handing over the title deeds by the borrower to the lender with the intention that these documents shall constitute the security for the debt. But if the parties choose to reduce the contract to writing, that document alone would be the sole evidence of its terms. In the latter case, the document shall have to be treated as an instrument creating a right in favour of the mortgagee to recover the loan from the properties to which the title deeds relate. Such an instrument requires to be registered under Section 17 of the Registration Act, as a non-testamentary instrument creating an interest of the value of Rs. 100 and upwards in immovable property. It would also become liable for stamp duty under Article 6 of the Schedule to the Act. Hence, the essential factor which determines whether a document is one by which an equitable mortgage is created is the intention of the parties. The existence

or otherwise of such intention can be established either by the documents produced by the parties or by oral evidence or by both."

MODE OF PROOF OF MEMORANDUM OF DEPOSIT OF TITLE DEED WHEN DISPUTED

Justice Chandrashekaraiiah of Karnataka High Court in Syndicate Bank vs M. Sivarudrappa AIR 2003 Kant 210, No doubt, the deposit of title deeds need not be in writing. The deed of mortgage other than the mortgage of deposit of title deeds is required to be attested by two witnesses. In the instant case, as the mortgage is by depositing of title deeds under Section 58(f), there is no need to execute any document in order to create a charge in respect of an immovable property, as delivery of the title deeds itself is sufficient to create a charge in respect of an immovable property for the money borrowed. But, in the instant case, the list of documents referred to in Ex. P. 8, said to have been delivered by the 2nd defendant to the Bank was not accepted by the Bank, since the title deed delivered is only a certified copy and not the original. As delivery of certified copy since has not been accepted by the Bank, the memorandum of deposit of title deed was got executed and registered. As the memorandum of title deed is a registered document and when that document has been specifically denied by the 2nd defendant in his reply notice and in the written statement filed by the

L.Rs of the 2nd defendant, the plaintiff-Bank ought to have examined one of the attesting witnesses to the said deed. In the instant case, no attesting witness has been examined in order to prove the execution of the document by the 2nd defendant. Further, the signature found on Exs. P. 8 and P. 9 is disputed and as there is discrepancy in the spelling of the name of Shivarudrappa as observed earlier, the Bank ought to have examined one of the attestors of the document. The Bank Manager who has been examined as P.W. 1 has not stated anywhere in his evidence that the 2nd defendant has signed Exs. P. 8 and P. 9 in his presence. If that is so, in the absence of any such positive evidence adduced by the plaintiff to prove the documents, Ex. P, 9, I am of the view that the Trial Court is justified in dismissing the suit insofar as the 2nd defendant is concerned.

WHEN ORIGINAL DEEDS ARE LOST

AIR 1982 Andhra Pradesh 272 (Kanigalla Prakasa Rao vs. Nanduri Ramakrishna Rao and others)
 “..... The owners of property who have so their documents of title will, therefore, be not in a position to deliver such original documents with intent to create an equitable mortgage. It will be rather anomalous if such persons can validly execute registered documents of sale, lease and mortgage, but will not be entitled to raise any monies by creating an equitable mortgage. If the original title deeds are lost,

we do not see why the owner of the property should not be in a position to an equitable mortgage. The mortgagee in such cases has only to be vigilant in accepting such representation made to him and should make the necessary enquiries before agreeing to advance any monies on the basis of registration extracts of documents of title or copies of documents. That seems to be the underlying principle behind S.78 of the Transfer of Property Act which provided that if the conduct of a prior mortgagee amounted to gross neglect, the mortgage in his favour will be postponed to the subsequent mortgagee.”

AIR 1974 Madras 16 (V.61, C.8) (Angu Pillai and others vs. M.S.M.Kasiviswanathan Chettiar and others "16. The decision of the Rangoon High Court in AIR 1933 Rang 299 upon which the trial Judge relied was overruled by a Full Bench of the Rangoon High Court in Chidambaram Chettyar v. Aiz Mean, AIR 1938 Rang 149 (FB). This Full Bench decision unfortunately does not appear to have been brought to the notice of the trial Judge. The Full Bench has reviewed the English and Indian authorities and has pointed put that in order to create a valid mortgage, it is not necessary that the whole, or even the most material of the documents of title to the property should be deposited; nor that the documents deposited should show a complete or good title in the depositor and it is sufficient if the deeds deposited bona fide relate to the property or are material

evidence of title or are shown to have been deposited with the intention of creating a security thereon.

Venkataramayya v. Narasinga Rao (1911) 21 Mad LJ 454 in support of his argument that even the deposit of sale deed in certain circumstances would not be sufficient to create an equitable mortgage. In that case, the debtor deposited a sale deed in the name of his father who had made a gift of the property in favour of his grandson by a deceased son. The property was admittedly the self acquired property of the father of the first defendant in that case. The question arose whether the deposit of that sale deed was sufficient to constitute a valid equitable mortgage. The Bench pointed out that the only document that was deposited did not show any kind of title in the depositor to the property as it was not a sale deed in his name but was a sale deed in the name of his father and that, therefore, no valid equitable mortgage was created.

AIR 2002 Madras 378 (M.M.T.C.limited vs. S.Mohamed Gani and another) “..... In order to prove the existence of an equitable mortgage, the following requisites are necessary: 1. A debt, 2. a deposit of title deeds and 3. an intention that the deeds shall be security for the debt. The debt may be an existing debt or a future debt. The debt may be an existing debt or a future debt. Insofar as the deposit of title deeds is concerned, physical delivery of

document is not the only mode of deposit and even the constructive delivery has been held sufficient. It is sufficient if the deeds deposited bona fide relate to the property or are any material evidence of title and are shown to have been deposited with an intention to create a security thereon. The essence of the whole transaction of equitable mortgage by deposit of title deeds is the intention that the title deeds shall be the security for the debt. Whether the said requisite intention is available in a given case is a question of fact and has to be ascertained after considering the oral, documentary and circumstantial evidence. It is true the mere fact of deposit does not raise the presumption that such an intention existed. Such an intention cannot be presumed from the possession since the mere possession of the deeds is not enough without evidence as to the manner in which the possession originated, so that an agreement may be inferred. Even the mere possession of the deeds by the creditor coupled with the existence of a debt need not necessarily lead to the presumption of a mortgage. The mere fact that the documents were coming from the custody of the plaintiff is not by itself sufficient to prove an intent to create a security. But in a given case unless and until the defendants satisfactorily explain how the documents came to the plaintiffs custody the said fact would be insignificant and have a great bearing”.

WHEN ORIGINALS OF TITLE DEED LOST HOW BEST MORTGAGE BE CREATED

JUSTICE G. RAJASURIA of Madras High Court in case of **Compendiously And Concisely vs Unknown Decided on 26 October, 2009** after citing many decisions stated that “A mere reading and poring over of those precedents, would ex facie and prima facie, make the point clear, that in order to create a valid equitable mortgage by deposit of title deed, there should be deposit of original title deed or if certified copy is deposited for creation of such mortgage, there should be clear declaration that the originals got lost, etc.....I would also like to point out that even if there is any prior creation of mortgage by deposit of title deeds with some other creditor then that fact should be disclosed to the subsequent lender of money and accordingly, second equitable mortgage can be created. But, my above discussion supra and also a plain poring over of the records available, would disclose that the Bank, it appears has not followed such a procedure. Even the copy of the CBI charge sheet as enclosed in the typed set of papers, would reveal that by furnishing false and forged title deeds of the suit properties, the alleged equitable mortgages were created. When the finding of the Investigating Agency itself is that by furnishing false and forged title deeds, such equitable mortgages were created, the question arises as to whether the bank de hors initiating criminal action, also by relying on such

equitable mortgages, initiate civil proceedings for recovering the debt.”

“..... At this juncture, I recollect and call up the following maxims:

(i) Ex turpi causa non oritur actio (Out of a base (illegal or immoral) consideration, an action does (can) not arise.

(ii) Ex dolo malo non aritur actio - (Out of fraud no action arises; fraud never gives a right of action. No court will lends its aid to a man who founds his cause of action upon an immoral or illegal act.

(iii) Ex nudo pacto non oritur actio : No action can arise from a bare agreement.”

“These three maxims would highlight and spotlight the fact that out of illegal act no legal cause of action arises for filing suits. If the agreements or the documents turned out to be void ones, the party to it cannot enforce them. While holding so, I also recollect up and call up the following maxims in favour of the bank.

1. Nemo allegans suam turpitudinem audiendus est - No one testifying to his own way is to be heard as a witness.

2. Nullus commodum capere potest de injuria sua propria: No one can take advantage by his own wrong.

3. Nul prendra advantage de son tort demesne: No one shall take advantage of his own wrong.

The gist and kernel of the above maxims are that the person who committed fraud cannot capitalise his own fraud.”

“15. No doubt on the plaintiffs' side, there are jurisprudential points to the effect that out of a void contract or illegal contract no legal cause of action would arise, but on the other hand the jurisprudential view in favour of the defendants, is that the person who committed fraud cannot capitalize his own fraud. These are all serious issues, which could be dealt with at the time of considering the one other application for rejection of plaint,”

Quoted citations

2005 (11) SCC 520 (Bank of India vs. Abhay D.Narottam and others) “ It is not necessary for us to determine the import of Section 125 of the Companies Act as we are of the opinion that the appeal must be dismissed on a much more basic ground. "Mortgage" has been defined in Section 58(a) of the Transfer of Property Act, 1882 as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, etc. Without a transfer of interest there is no question of there being a mortgage. The same principle would apply to charge under section 100 of the Transfer of Property Act. Section 100 provides that all the provisions which apply to a simple mortgage shall, so far as may be, apply to such charge. The definition of simple mortgage in Section 58(b) of the Act merely speaks of the procedure and describes that species of mortgage.As far as the land is concerned, we agree with the learned Judge that a mere undertaking

to create a mortgage is not sufficient to create any interest in any immovable property.”

2006 (1) SCC 697 (R.Janakiraman vs. State rep.by Inspector of Police, CBI, SPE, Madras) “.....It is clear to us that the bar imposed by sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties”.

2007(8) SCC 361 (Syndicate Bank vs. Estate Officer & Manager, APIIC Ltd., and others)
 “29. Each case will have to be considered on its own

facts. A jurisprudential title to a property may not be a title of an owner. A title which is subordinate to an owner and which need not be created by reason of a registered deed of conveyance may at times create title. The title which is created in a person may be a limited one, although conferment of full title may be governed upon fulfilment of certain conditions. Whether all such conditions have been fulfilled or not would essentially be a question of fact in each case. In this case a right appears to have been conferred on the allottee by issuance of a valid letter of allotment coupled with possession as also licence to make construction and run a factory thereon, together with a right to take advances from banks and financial institutions subject, of course, to its fulfilment of condition may confer a title upon it in terms of Section 58(f) of the Transfer of Property Act, but the question would be whether such a right is assignable”

CHAPTER - 13

ACKNOWLEDGEMENT OF DEBT

LIMITATION AND ACKNOWLEDGEMENT

In Syndicate Bank v. T. Basappa ILR 1986 KAR 3015, the Karnataka High Court has taken the view that where the debt is sought to be recovered both against the principal debtor as well as the surety, the acknowledgment by the surety does not save the period of limitation as against the principal debtor.

In R. Lilavati v. Bank of Baroda, , AIR 1987 KAR 2, the Karnataka High Court has held that where surety had specifically empowered the principal to give consent on behalf of the surety, in respect of all matters concerning the debt, the acknowledgment of liability given by the principal would be binding on the surety, although the surety was personally not a party to the acknowledgment. Since the acknowledgment given by the principal, would bind the surety, it was held that limitation was saved even as against the surety.

J.C. Budhraja vs. Chairman, Orissa Mining Corporation Ltd. and Ors AIR 2008 SC 1363

Section 18 of the Limitation Act, 1963 deals with effect of acknowledgment in writing. Sub-section (1) thereof provides that where, before the expiration of the prescribed period for a suit or application in respect

of any right, an acknowledgement of liability in respect of such right has been made in writing signed by the party against whom such right is claimed, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed. The explanation to the section provides that an acknowledgement may be sufficient though it omits to specify the exact nature of the right or avers that the time for payment has not yet come or is accompanied by a refusal to pay, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the right. It is now well settled that a writing to be an acknowledgement of liability must involve an admission of a subsisting jural relationship between the parties and a conscious affirmation of an intention of continuing such relationship in regard to an existing liability. The admission need not be in regard to any precise amount nor by expressed words. If a defendant writes to the plaintiff requesting him to send his claim for verification and payment, it amounts to an acknowledgement. But if the defendant merely says, without admitting liability, it would like to examine the claim or the accounts, it may not amount to acknowledgement. In other words, a writing, to be treated as an acknowledgement of liability should consciously admit his liability to pay or admit his intention to pay the debt. Let us illustrate. If a creditor sends a demand notice demanding payment of Rs. 1 lakh due under a promissory note executed by the debtor and the

debtor sends a reply stating that he would pay the amount due, without mentioning the amount, it will still be an acknowledgement of liability. If a writing is relied on as an acknowledgement for extending the period of limitation in respect of the amount or right claimed in the suit, the acknowledgement should necessarily be in respect of the subject matter of the suit. If a person executes a work and issues a demand letter making a claim for the amount due as per the final bill and the defendant agrees to verify the bill and pay the amount, the acknowledgement will save limitation for a suit for recovery of only such bill amount, but will not extend the limitation in regard to any fresh or additional claim for damages made in the suit, which was not a part of the bill or the demand letter. Again we may illustrate. If a house is constructed under the item rate contract and the amount due in regard to work executed is Rs. two lakhs and certain part payments say aggregating to Rs. 1,25,0000/- have been made and the contractor demands payment of the balance of Rs. 75,000/- due towards the bill and the employer acknowledges liability, that acknowledgement will be only in regard to the sum of Rs. 75,000/- which is due. If the contractor files a suit for recovery of the said Rs. 75,000/- due in regard to work done and also for recovery of Rs. 50,000/- as damages for breach by the employer and the said suit is filed beyond three years from completion of work and submission of the bill but within three years from the date of acknowledgement,

the suit will be saved from bar of limitation only in regard to the liability that was acknowledged namely Rs. 75,000/- and not in regard to the fresh or additional claim of Rs. 50,000/- which was not the subject matter of acknowledgement. What can be acknowledged is a present subsisting liability. An acknowledgment made with reference to a liability, cannot extend limitation for a time barred liability or a claim that was not made at the time of acknowledgment or some other liability relating to other transactions. Any admission of jural relationship in regard to the ascertained sum due or a pending claim, cannot be an acknowledgement for a new additional claim for damages. Under Section 18 an acknowledgement in writing extends the limitation. Under Section 19 a payment made on account of a debt, enables a fresh period of limitation being computed.

Interpreting Section 19 of the Limitation Act, 1908 (corresponding to Section 18 of the Limitation Act, 1963) Court in **Shapur Freedom Mazda v. Durga Prosad Chamaria** [1962]1SCR140 , held : ...acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication. The statement on which a plea of acknowledgement is based must relate to a

present subsisting liability though the exact nature or the specific character of the said liability may not be indicated in words. Words used in the acknowledgement must, however, indicate the existence of jural relationship between the parties such as that of debtor and creditor, and it must appear that the statement is made with the intention to admit such jural relationship. Such intention can be inferred by implication from the nature of the admission, and need not be expressed in words. If the statement is fairly clear, then the intention to admit jural relationship may be implied from it. The admission in question need not be express but must be made in circumstances and in words from which the court can reasonably infer that the person making the admission intended to refer to a subsisting liability as at the date of the statement. Stated generally, courts lean in favour of a liberal construction of such statements though it does not mean that where no admission is made one should be inferred, or where a statement was made clearly without intending to admit the existence of jural relationship such intention could be fastened on the maker of the statement by an involved or far-fetched process of reasoning.In construing words used in the statements made in writing on which a plea of acknowledgement rests oral evidence has been expressly excluded but surrounding circumstances can always be considered.... The effect of the words used in a particular document must inevitably depend

upon the context in which the words are used and would always be conditioned by the tenor of the said document...

Syndicate Bank v. R. Veeranna, AIR 2003 SC 2122. An unqualified acknowledgement of liability by a party not only saves the period of limitation but also gives a cause of action to the plaintiff to base its claim.

Food Corporation of India vs. Assam State Co-operative Marketing and Consumer Federation Limited and Ors (2004) 12 SCC 360 According to Section 18 of the Limitation Act, an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed. It is well-settled that to amount to an acknowledgement of liability within the meaning of Section 18 of the Limitation Act, it need not be accompanied by a promise to pay either expressly or even by implication. The statement providing foundation for a plea of acknowledgement must relate to a present subsisting liability, though the exact nature or the specific character of the said liability may not be indicated in words. The words used in the acknowledgement must indicate the existence of jural relationship between

the parties such as that of debtor and creditor. The intention to attempt such jural relationship must be apparent. However, such intention can be inferred by implication from the nature of the admission and need not be expressed in words. A clear statement containing acknowledgement of liability can imply the intention to admit jural relationship of debtor and creditor. Though oral evidence in lieu of or making a departure from the statement sought to be relied on as acknowledgement is excluded but surrounding circumstances can always be considered. Courts generally lean in favour of a liberal construction of such statements though an acknowledgement shall not be inferred where there is no admission so as to fasten liability on the maker of the statement by an involved or far-fetched process of reasoning. (See : Shapoor Freedom Mazda v. Durga Prosad Chamaria and Ors. [1962]1SCR140 and "Lakshmiratan Cotton Mills Co. Ltd. Etc. v. The Aluminium Corporation of India Ltd. [1971]2SCR623). So long as the statement amounts to an admission, acknowledging the jural relationship and existence of liability, it is immaterial that the admission is accompanied by an assertion that nothing would be found due from the person making the admission or that on an account being taken something may be found due and payable to the person making the acknowledgement by the person to whom the statement is made.

In K.Ganapathy Vs. Vidyalingam, AIR 1971 Madras 425, it had been held that a mere acknowledgment of the execution of the promissory note, without anything more, cannot amount to an admission of a subsisting liability so as to give a fresh period of limitation for a suit on a pronote. The acknowledgment of execution of the document in itself will not throw the burden on the executant.

In Sampuram Singh Vs. Niranjan Kumar, AIR 1999 SCC 1047, it had been stated that the acknowledgment, if any, has to be made prior to the expiration of the prescribed period for the filing of the suit. If the limitation had already expired the acknowledgment made thereafter would not revive the claim, as it would be hit by the law of limitation.

In Raja of Vizianagaram Vs. Official Liquidator, AIR 1952 Madras 136 it had been held that an acknowledgment of the liability made after the expiration of the period of limitation cannot give a cause of action for making a claim of a time barred debt. Acknowledgment can be only of a subsisting liability.

In Tilak Ram Vs. Nathu, AIR 1967 SC, 935, the Hon'ble Supreme Court deciphered the following requirements to attract Section 18 of the Limitation Act:-

[i] an admission or acknowledgment;

- [ii] such acknowledgment must be in respect of a liability regarding a property or right;
- [iii] acknowledgment must be made before the expiry of limitation period ;
- [iv] it should be in writing and signed by the party against whom such right is claimed.

"The right of redemption no doubt is of the essence of and inherent in a transaction of mortgage. But the statement in question must relate to the subsisting liability or the right claimed. Where the statement is relied on as expressing jural relationship it must show that it was made with the intention of admitting such jural relationship subsisting at the time when it was made. It follows that where a statement setting out jural relationship is made clearly without intending to admit its existence, an intention to admit cannot be imposed on its maker by an involved or a far-fetched process of reasoning."

**Reet Mohinder Singh Sekhon v. Mohinder Parkash
(AIR 1989 SC 1775)**

The period of limitation cannot be extended by a mere passing recital regarding the factum of the mortgage but the statement on which the plea of an acknowledgment is based must relate to a subsisting liability. The words used must indicate the jural relationship between the parties and it must appear that such a statement is made with the intention of admitting such jural relationship.

Prabhakaran v. M. Azhagiripillai (AIR 2006 SC 1567). To summarise, a statement (in writing and signed) by a mortgagee can be construed as an 'acknowledgement' under Section 18 of the Limitation Act, if it fulfils the following requirements :

(i) The acknowledgement of liability must relate to a subsisting mortgage.

(ii) The acknowledgement need not be in a document addressed to the mortgagor (person entitled to the property or right). But it should be made by the mortgagee (the person under liability).

(iii) The words used in the acknowledgement must indicate the existence of jural relationship between the parties and it must appear that the statement is made by the mortgagee with the intention of admitting the jural relationship with the mortgagor.

(Such intention of admitting the jural relationship need not be in express terms, but can be inferred or implied from the nature of admission and the words used, though oral evidence as to the meaning and intent of such words is excluded.)

(iv) Where the statement by the mortgagee in the subsequent document (say, deed of assignment) merely refers to the mortgage in his favour which is being assigned, without the intention of admitting the jural relationship with the mortgagor, it will not be considered to be an 'acknowledgement'.

In Valliamma Champaka Pillai v. Sivathanu Pillai and Ors. (1979) SCC 429, it was held as under:

"Under Section 18 of the Limitation Act, 1908, one of the essential requirements for a valid 'acknowledgment' is that the writing concerned must contain an admission of a 'subsisting liability'. A mere admission of the past liability is not sufficient to constitute such an 'acknowledgment'. Hence a mere recital in a document as to the existence of a past liability, coupled with a statement of its discharge, does not constitute an 'acknowledgment' within this Section."

In the case of Hansa Industries (P) Ltd. v. MMTC Limited 113 (2004) DLT 474, it was held as under:

"19. We can deduce the following principles from the aforesaid judgments which shall have to be applied in a given case to ascertain as to whether writing constitutes an acknowledgment or not:

(a) Acknowledgment means an admission by the writer that there is a debt owned by him either to the receiver of the letter or to some other person on whose behalf it is received. It is not enough he refers to a debt as being due from somebody. He must admit that he owes the debt.

(b) The statement on which a plea of acknowledgment is based must relate to a present subsisting liability though the exact nature of the specific character of the said liability may not be indicated in words.

(c) Words used in the acknowledgment indicate the circumstances of jural relationship between the parties such as that of debtor and creditors.

(d) It must appear that statement is made with the intention to admit such jural relationship.

(e) Such intention can be implied and need not be expressed in words. In construing the words used in the statement, surrounding circumstances can be considered although oral evidence is excluded.

(f) Although liberal construction is to be given to such statement but where a statement was made without intending to admit the existence of jural relationship, the Court cannot fasten such intention on the maker by an involved or far-fetched process of reasoning.

(g) In deciding the question in a particular case, it is not useful to refer to judicial decision and one has to inevitably depend upon the context in which words are used."

Gudal Rachappa vs. S.S. Mallikarjuna MANU/KA/5596/2019 R.F.A. No. 2065 of 2006 Decided On: 17.07.2019 - In order to attract Section 18 of the Limitation Act, what is required is before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has to be made in writing and signed by the party against whom such property or right is claimed. When Section 18 of the Limitation Act is required to be attracted, there must be an existing liability as on the date of its acknowledgement. In cases where a party acknowledges previous loan transaction or its previous liability, but further says

that the said liability has been cleared off by him, the said statement would only be an acknowledgement of previous loan transaction but, it cannot be read as an acknowledgement of liability. The alleged cleared debt cannot be read as an existing liability on the part of the party who makes a statement regarding the previous debt.

United Commercial Bank, Bangalore vs. B.M. Mahadeva Babu and Ors. AIR 1992 Kant 294 A perusal of S. 18 of the Limitation Act be reflected herein above unmistakably would go to show that the acknowledgment of the debt should be made in writing. Secondly it should be made by the party against whom the liability is claimed or by persons through whom he derives title or liability. Lastly the acknowledgment should be made before the expiration of the prescribed period for a suit. If these conditions are satisfied then period of limitation begins to run only from the time when the acknowledgment was so signed.

Karnataka Small Scale Industries Corporation Ltd. vs. S.N.R. Handloom Silk Enterprises MANU/KA/4095/2019, 2019(3) AKR 761 Section 18 of the Limitation Act, 1963 regarding effecting of acknowledgement in writing and Section 18 says that; where before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of

such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed. On reading of the very proviso of Section 18, it is clear that in view of the acknowledgment made a fresh period of limitation shall be computed from the time when the acknowledgment was so signed

ACKNOWLEDGEMENT THROUGH EMAIL VALID

Sudarshan Cargo Pvt Ltd vs M/S Techvac Engineering Pvt Ltd ILR 2013 KAR 3941

Section 18 does not provide that acknowledgement has to be in any particular form or to be express. Even a statement which, if literally construed, does amount to an acknowledgement, may be sufficient, if it implies an admission of liability. A narrow interpretation should not be put on what constitutes acknowledgement under Section 18. An acknowledgement is an admission by the debtor to the creditor indicating that he owes money to the creditor. The acknowledgement requires to be examined in the light of surrounding circumstances by an admission that the writer owes a debt. Generally speaking, a literal construction of the statement on which the acknowledgement is sought to be founded should be given. If there is an admission of fact of which the liability in question is a necessary consequence, it

should be taken as an acknowledgement. The word 'writing' employed in Section 18 refers to paper based traditional manual writing. However, the Information Technology Act, 2000 (hereinafter referred to as 'IT Act, 2000' for brevity) provides for legal recognition for transactions carried out by means of electronic data/electronic communication which involve the use of alternatives to paper based methods of communication and storage of information. an acknowledgement of debt by e-mail originating from a person who intends to send or transmit such electronic message to any other person who would be the 'addressee' would constitute a valid acknowledgment of debt and it would satisfy the requirement of Section 18 of the Limitation Act, 1963 when the originator disputes having sent the e-mail to the recipient.

LIMITATION TO FILE CLAIM SUIT EXPLAINED

State Bank of India vs. M/s. B.S. Agricultural Industries (I), AIR 2009 SC 2210 (Paragraphs 11 to 14)

11. In a recent case of Gannmani Anasuya and Others v. Parvatini Amarendra Chowdhary and Others, (2007) 10 SCC 296, this Court highlighted with reference to Section 3 of the Limitation Act that it is for the court to determine the question as to whether the suit is barred by limitation or not irrespective of the fact that as to whether such a plea has been raised

by the parties; such a jurisdictional fact need not be even pleaded.

12. Insofar as the present case is concerned, at the first available opportunity in the written statement itself the Bank raised the plea that the complaint was barred by limitation. However, the objection with regard to limitation went unnoticed by all the three fora, namely, District Forum, State Commission and National Commission. Since the question relating to limitation goes to the root of the matter and may render the order illegal, we would now see whether the complaint was filed within time i.e., within two years of accrual of cause of action.

13. In this regard, the letter dated April 21, 1994 with which bills and GR's were sent by the complainant to the Bank assumes significance.

14. The said letter clearly instructs the Bank to return the documents if not honoured by drawee by June 7, 1994. Obviously, the cause of action accrued to the complainant on June 7, 1994 when it did not receive the demand draft for Rs. 2,47,154/- nor received the documents. The limitation, thus, began to run from June 7, 1994. The complaint ought to have been filed within two years therefrom which in fact was not done as the complaint was filed much thereafter i.e., on May 5, 1997. The complaint was apparently time barred.

Court in S. Brahamanand and Others v. K.R. Muthugopal (Dead) and Others [(2005) 12 SCC 764]

wherein this Court laid down the law: Thus, this was a situation where the original agreement of 10-3-1989, had a fixed date for performance, but by the subsequent letter of 18-6-1992 the defendants made a request for postponing the performance to a future date without fixing any further date for performance. This was accepted by the plaintiffs by their act of forbearance and not insisting on performance forthwith. There is nothing strange in time for performance being extended, even though originally the agreement had a fixed date. Section 63 of the Contract Act, 1872 provides that every promise may extend time for the performance of the contract. Such an agreement to extend time need not necessarily be reduced to writing, but may be proved by oral evidence or, in some cases, even by evidence of conduct including forbearance on the part of the other party. Thus, in this case there was a variation in the date of performance by express representation by the defendants, agreed to by the act of forbearance on the part of the plaintiffs. What was originally covered by the first part of Article 54, now fell within the purview of the second part of the article...

IN AGREEMENTS LIMITATIONS RUNS FROM THE DATE WHEN PERFORMANCE IS REFUSED.

In R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy [(2006) 2 SCALE 156], it was observed: In terms of the said Article, a suit for specific performance of a

contract is required to be filed within three years; in the event no date is fixed for the performance, within a period of three years from the date when the plaintiff has notice that performance is refused. The notice dated 24.04. 1984, thus, is required to be construed in the context of the agreement dated 13.10.1982 entered into by and between the parties. There cannot be any doubt whatsoever that in respect of a contract for sale of immovable property, time is not of the essence of the contract, but the question as regard the conduct of the Appellant must be considered in the backdrop of the events noticed hereinbefore.

Gunwantbhai Mulchand Shah & Ors. v. Anton Elis Farel & Ors. [(2006) 3 SCALE 82] wherein it has been held: We may straightaway say that the manner in which the question of limitation has been dealt with by the courts below is highly unsatisfactory. It was rightly noticed that the suit was governed by Article 54 of the Limitation Act, 1963. Then, the enquiry should have been, first, whether any time was fixed for performance in the agreement for sale, and if it was so fixed, to hold that a suit filed beyond three years of the date was barred by limitation unless any case of extension was pleaded and established. But in a case where no time for performance was fixed, the court had to find the date on which the plaintiff had notice that the performance was refused and on finding that date, to see whether the suit was filed within three years thereof. We have explained the position in the

recent decision in *R.K. Parvatharaj Gupta v. K.C. Jayadeva Reddy* 2006 (2) Scale 156. In the case on hand, there is no dispute that no date for performance is fixed in the agreement and if so, the suit could be held to be barred by limitation only on a finding that the plaintiffs had notice that the defendants were refusing performance of the agreement. In a case of that nature normally, the question of limitation could be decided only after taking evidence and recording a finding as to the date on which the plaintiff had such notice. We are not unmindful of the fact that a statement appears to have been filed on behalf of the plaintiffs that they do not want to lead any evidence. The defendants, of course, took the stand that they also did not want to lead any evidence. As we see it, the trial court should have insisted on the parties leading evidence, on this question or the court ought to have postponed the consideration of the issue of limitation along with the other issues arising in the suit, after a trial."

LIBERAL CONSTRUCTION RATHER THAN LITERAL

In Adivelu (dead by LRs) vs. Narainachari AIR 2005 Karnataka 236, the Hon^{ble} Single Judge while dealing with the issue of effect of acknowledgment in writing of a pro-note, held that for judging the nature and quality of the acknowledgment as to whether it is

a promise in future, the whole of the acknowledgment and the surrounding circumstances have to be taken into consideration. A liberal construction rather than a literal one, was suggested by the Hon^{ble} Single Judge.

Sun N Sand Hotel Limited versus V.V.Kamat HUF, AIR 2003 Bombay 168 The unconditional confirmation/ acknowledgement of the closing balance constitutes an implied promise by the defendant to pay the same.

ARBITRATOR APPOINTMENT AND TIME BARRED DEBT

In Schlumberger Asia Services Limited vs. Oil and Natural Gas Corporation Limited reported in (2013) 7 SCC 562, the Supreme Court considered the power of Chief Justice or his designate to consider long time barred claims and it was observed that it is optional for the Judge to decide whether the claim is evidently and patently time barred. If a claim for appointment of arbitrator is made decades after completion of the work, without the benefit of any acknowledgment of liability which might keep alive the claim, it is open for the Judge exercising powers under Section 11 of the Arbitration Act, to pass appropriate order on a time barred claim. But it is not imperative for the Chief Justice or his designate to decide the questions at the threshold. It can be left to be decided by the Arbitral Tribunal. It is also

made clear by this Court that the Chief Justice or his designate would do so only when the claim is evidently and patently a long time-barred claim. The claim could be said to be patently long time-barred, if the contractor makes it a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law. On the other hand, if the contractor makes a claim, which is slightly beyond the period of three years of completing the work say within five years of completion, the Court will not enter into disputed questions of fact as to whether the claim was barred by limitation or not. The judgment further makes it clear that there is no need for any detailed consideration of evidence. In the present case, there is a dispute as to whether the repeated notices sent by the petitioner to the respondents were ever received. There are further disputes (even if the notices were received by ONGC) as to whether they were actually received in the correct section of ONGC. These are matters of evidence which are normally best left to be decided by the Arbitral Tribunal.

ACKNOWLEDGEMENT OF DEBT THROUGH CHEQUE

A Division Bench of the High Court of Madhya Pradesh also in Balchand Champalal Bhandari Vs. India Pictures AIR 1967 MP 280 held that whenever a cheque or similar instrument is passed by the debtor to the creditor, the date on which acknowledgment

implicit in the cheque is made is the date when the period of limitation commences.

Rajasthan High Court in New age Rice mills vs Mahaveer Rice - AIR 2001 RAJASTHAN 248

The burden is on the plaintiff and he is required to allege and prove not only that there was payment of interest on a debt or part payment of the principal but that such payment had been acknowledged in writing in the manner contemplated by the section. The plaintiff must establish that the payment was in fact made by the debtor towards the debt in dispute. The term 'person liable to pay' in Section 19 of the Act of 1963 means any person liable to pay the debt. Accordingly, a payment by one of the persons liable can avail not merely against the person making the payment and his successors, but even against other persons liable in respect of the same debt.

The principle on which each partner binds all his associates is the principle of agency and it has accordingly been held by all the High Courts that in a going mercantile concern the authority of a partner to sign acknowledgments etc. on the firm's behalf is to be presumed as an ordinary rule. In such a case, the partner has implied authority to keep the debt alive, and evidence of authority from the other partners is not necessary. Hence, when the acknowledgment or payment is made by one of the partners, it must be binding on other partners also. The agent's authority need not necessarily be in writing and it may be

proved by oral evidence. The agent's authority may be either express or implied from all surrounding circumstances and it may be general or special. No formal authorisation of the agent is required and his authority may be implied, i.e. it is permissible for the Court to presume authority from the attendant circumstances.

Section 20 of the Act of 1963 thus supplements the provisions of Sections 18 and 19 of the Act of 1963 and may be treated as an Explanation to these two Sections. This Section, like Sections 18 and 19, concerns itself with the question as to who can keep alive a liability, which has not become time-barred. It may be made clear that this Section has nothing to do with the revival of a time-barred debt.

In the above case One of the partners of debtor firm issued cheque acknowledging debt acting in capacity of partner of debtor firm. Evidence of plaintiff-creditor firm as to issue of said cheque by said partner in said capacity is not rebutted. Burden of proof thus discharged by plaintiff as to acknowledgment of debt. Fresh limitation would accrue in favour of plaintiff from date of said acknowledgment.

Saroop Singh v. Rattan Singh (dead) through LRs
AIR 2016 PUNJAB AND HARYANA 36 Signing and issuing cheque in favour of the respondent-plaintiff would amount to owing and acknowledging the liability by the appellant-defendant. All these go to

prove beyond doubt that the appellant-defendant had acknowledged and accepted his debt.

EFFECT OF ACKNOWLEDGEMENT IN WRITING AS STATED IN SECTION 18 OF LIMITATION ACT.

Supreme Court in State of Kerala v. T.N. Chacko reported in AIR 2000 SC 3597 - Now, we shall advert to Section 18 of the Limitation Act which speaks of the effect of acknowledgment in writing and it reads as follows :

"18. Effect of acknowledgment in writing.

(1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but subject to the provisions of the Indian Evidence Act, 1972 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.- For the purposes of this section,-

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery,

performance or enjoyment has not yet come or is accompanied by refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set off, or is addressed to a person other than a person entitled to the property or right,

(b) the word 'signed' means signed either personally or by an agent duly authorised in this behalf, and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property to right."

From a perusal of sub-section (1) of Section 18 it is evident that to invoke this provision :

(1) there must be an acknowledgment of liability in respect of property or right;

(2) the acknowledgment must be in writing signed by the party against whom such right or property is claimed (or by any person through whom he derives his title or liability); and

(3) the acknowledgment must be made before the expiration of the period prescribed for a suit or application (other than application for the execution of a decree) in respect of such property or right.

The effect of such an acknowledgment is that a fresh period of limitation has to be computed from the time when the acknowledgment was so signed.

8. Sub-section (2) permits giving of oral evidence at the trial of the suit where the acknowledgment is undated but it prohibits, subject to the provisions of the Evidence Act, receiving of oral evidence of contents of the acknowledgment.

9. Clause (a) of the explanation appended to that section says that an acknowledgment may be sufficient for purposes of Section 18 even though. (i) it omits to specify the exact nature of the property or right; (ii) it avers that the time for payment, delivery, performance or enjoyment has not yet come; (iii) it is accompanied by refusal to pay, deliver, perform or permit to enjoy; (iv) it is coupled with a claim to act off; or (v) it is addressed to a person other than a person entitled to the property or right. Clause (b) of the explanation defines the word 'signed' to mean signed either personally or by an agent duly authorised in that behalf.

10. It may be noted that for treating a writing signed by the party as an acknowledgment, the person acknowledging must be conscious of his liability and the commitment should be made towards that liability. It need not be specific but if necessary facts which constitute the liability are admitted an acknowledgment may be inferred from such an admission.

EFFECT OF ACKNOWLEDGEMENT UNDER SECTION 14 OF LIMITATION ACT

Kone Elevator India Ltd. v. M/s. Hotel Padma Private Ltd. 2019 AIR CC 2162 (MAD) In the facts of this case, Sale effected and goods delivered in year 1991. No express and unconditional promise made by defendant for payment of dues. Alleged

acknowledgment of debt in year 1998. Court held that, Section 14 of the Limitation Act, 1963, where it was very clear for the price of goods sold and delivered where no fixed period of credit is agreed upon three years is the limitation. Now, as per the case of the plaintiff, the said debt was acknowledged by the defendants only in the year 1998. So, the said acknowledgement is not made within the period of three years. In this regard the defendants did not made any express promise to pay the entire due claimed by the plaintiff. So, the acknowledgment given by the defendants, that too, after seven years, is no way helpful for the claim of the plaintiff.

Quoted citations

K.Jeyaraman v. Sundaram Industries Ltd., through the Special Officer, reported in 2008 (4) MLJ 842 : (AIR 2008 (NOC) 2532), wherein it has been observed that Section 25(3) of the Contract Act contemplates an express 'promise' on the part of the person making promise and the promise should be unconditional. But in the letter sent by the defendants to the plaintiff discloses that the defendants did not made any express promise. So, it cannot be held that due to the admission made by the defendants, the period of limitation is saved.

Judgment of the Hon'ble Apex Court reported in the case of Sampuran Singh and others v. Niranjana Kaur and others, reported in AIR 1999 SC 1047 wherein, it has been held as follows: "9. Section 18, sub-section (1) itself starts with the words "Where,

before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made...." thus, the acknowledgment, if any, has to be prior to the expiration of the prescribed period for filing the suit, in other words, if the limitation has already expired, it would not revive under this Section. It is only during subsistence of a period of limitation, if any, such document is executed, the limitation would be revived afresh from the said date of acknowledgment".

High Court of Allahabad in the case of Mukat Lal and others v. Gulab Singh Pran Mal, reported in AIR 1931 Allahabad 229, it has been held as follows: "In a simple transaction of sale of goods, the liability to pay the full price accrues on the date of the sale. The fact that the purchaser, not having all the money in his hands, agrees to pay the balance with interest at a certain rate does not prevent the accruing of the vendor's right to recover the whole price on account of the purchase and time begins to run from the date of the sale. Vendor must sue within three years from that date in order to get a personal decree against the purchaser."

So, by following the principle laid down in the judgments cited supra, it is clear that a debt has to be acknowledged within the period of limitation. But in the case on hand, the acknowledgement is not within the period of three years.

ACKNOWLEDGEMENT OF DEBT BY KARTA

Nanchand Gangaram Shetji vs. Mallappa Mahalingappa Sadalge and Ors. AIR 1976 SC 835 If

at the relevant time the joint Hindu family as such was no longer in existence because of division or disruption of its joint status, any acknowledgement made by the erstwhile karta of such family cannot keep the debt alive and extend limitation as against all the members of the family, his representative capacity as karta being conterminous with the joint status of the family. It is therefore the duty of the creditor to ascertain after due enquiry whether the person making the acknowledgement still holds his representative capacity as karta of the family. The law does not cast any duty upon the members of the family who do not figure in the endorsement or writing admitting the debt to inform the creditor by a general notice about the disruption of the family. If the creditor fails to make an enquiry and satisfy himself about the capacity of the executant to represent the family at the time of making the acknowledgement, he does so at his own peril. Disruption of the joint family status as already noticed, puts an end to the representative capacity of the karta and any acknowledgement of a debt made by him after such disruption cannot save the creditors' claim from becoming time-barred against the other members.

ACKNOWLEDGEMENT THROUGH AGENT

Ibrahim Abdul Latif Shaikh vs. Corporation Bank and Ors. 2002 (4) KCCR 2877 The appellant as a guarantor, authorises the borrower to execute the acknowledgement of debt liability on behalf of the guarantor and acknowledgement of debt liability either in writing or by part payment under the signature made by the borrower shall constitute a valid acknowledgement of debt liability on behalf of the guarantor also. In view of the said stipulation, it becomes explicit that the appellant had constituted any agency in the principal debtor to execute acknowledgement or revival letters so as to bind himself.

Parasuraman And Ors. vs Purushothaman & Co. And Ors. AIR 1977 Ker 132 A representation made by an agent is admissible in evidence against the principal only in the following cases:

"(a) Where it was made as part of a communication expressly authorised by the principal.

(b) Where it has reference to some master or transaction upon which the agent was employed on the principal's behalf at the time when the admission or representation was made, and the making thereof was within the ordinary course of that employment.

(c) Where it has reference to some matter or transaction respecting which the person to whom the admission or representation was made had been

expressly referred by the principal to the agent for information."

FRESH PERIOD STARTS FROM DATE OF LAST PAYMENT TOWARDS LOAN

K.N. Raju vs. Manjunath T.V. 2018 (4) Kar LJ 595

Article 21 of the Indian Limitation Act, the period of limitation for recovery of loan amount starts from the date on which the amount has been paid. Further, as per Section 18 of the Limitation Act, a fresh period of limitation shall be computed if any acknowledgement of debt has been executed by the borrower within the prescribed period of limitation i.e., within three years from the date of borrowing of the loan. Further Section 19 of the Limitation Act makes it clear that a fresh period of limitation shall be computed from the date of payment of some money towards the loan in question.

Smt. Gomty Raghwan v. UCO Bank, Durg AIR 2019 CHHATTISGARH 175

6. Admittedly, loan was sanctioned to appellant on 6-10-1981 to the tune of Rs.1,38,000/- by respondent No.1 Bank for purchasing Hindustan Diesel Truck. The said term loan was repayable to the Bank by the borrower by 48 equal monthly instalments of Rs.2875/- each commencing from December, 1981 together with interest @ 12.50% per annum or such

other rates as may be revised from time-to-time as per direction of Reserve Bank of India with quarterly rests on the outstanding amount. As per documents Ex.P/11 and P/12, appellant agreed to addition of interest calculated in every quarter to the sum due. Rs.1,23,000/- was disbursed to the appellant on 6-10-1981 and Rs.15,000/- was again disbursed to him on 19-12-1981. Appellant repaid the amount from 9-1-1982 to 8-7-1983 and thereafter he stopped making payment to the Bank. Notice was served to appellant, but he failed to comply with the demand made through said notice.

7. From the evidence it is clear that the appellant was paying the instalments upto 8-7-1983 and thereafter he acknowledged the loan amount as per document Ex.P/18 dated 12-2-1985. Again she acknowledged the debt on 6-7-1986 as per Ex.,P/19. When the appellant repaid the instalments upto 8-7-1983 and acknowledged the same, the loan was recoverable upto 8-7-1986 and it was acknowledged on 12-2-1985 and 6-7-1986 for subsisting the loan. The period of limitation extends from the date of acknowledgment and in the present case, the loan was subsisting on the date of acknowledgment because installment is paid upto 8-7-1983.

**P.N. Veetil Narayani vs. Pathumma Beevi (Dead)
by L.Rs. and Ors. AIR 1991 SC 720**

Sub-section (1) of Section 18 of the Limitation Act provides as follows: Where, before the expiration of the

prescribed period of a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title-or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

Sub-section (2) of Section 20 says that nothing in the said sections (being Sections 18 and 19) renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed by, or of a payment made by, or by the agent of, any other or others of them.

The heirs of a muslim dying intestate on whom falls the liability to discharge the debt, proportionate to their respective shares in the estate devolved, can hardly be classified as joint contractors, partners, executors or mortgagees. As held above they are by themselves independent debtors; the debt having been split by operation of law. Inter se they have no jural relationship as co-debtors or joint debtors so as to fall within the shadow of contractors, partners, executors or mortgagees or in a class akin to them. They succeed to the estate as tenants-in-common in specific shares. Even a signed written acknowledgment by the principal or through his agent would bind the principal and not anyone else standing in jural relationship with the principal in accordance with Section 20(2). The Muslim heirs inter-se have no such

relationship. In this view of the matter, we take the view that the High Court was right in confining the acknowledgment of the debts only to respondent No. 2 and not extending the acknowledgment to the other co-heirs for their independent position.

Section 19 of the Limitation Act, (corresponding to Section 20 of the repealed Act IX of 1908), so far as is relevant for our purpose, provides that where payment on account of debt or of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

In the context, if the debt is one and indivisible, payment by one will interrupt limitation against all the debtors unless they come within the exception laid down in Section 20(2) which has been taken note of earlier. And if the debt is susceptible of division and though seemingly one consists really of several distinct debts each one of which is payable by one of the obligors separately and not by the rest, Section 20 keeps alive his part of the debt which has got to be discharged by the person who has made payment of interest. It cannot affect separate shares of the other debtors unless on the principal of agency, express or implied, the payment can be said to be a payment on their behalf also. See in this connection *Abheswari Dasya and Anr. v. Baburali Shaikh and Ors.* MANU/WB/0052/1936 : AIR1937Cal191 . The

payment made on account of debt by defendant-respondent No. 2 as an independent debtor, and not as an agent, express or implied, on behalf of other co-heirs could hardly, in the facts established, here be said to be a payment on behalf of all so as to extend period of limitation as against all. We are thus of the considered view that the High Court was right in confining the extension of limitation on payment of a part of debt only against defendant-respondent No. 2, proportionate to his share of the estate devolved on him which was one fourth. We are further of the view that the High Court was right in holding the suit against other co-heirs to be barred by limitation relating to their shares of the debt.

**MERE PAYMENT DOES NOT EXTEND LIABILITY -
ITS SHOULD BE SIGNED BY THAT PERSON**

KAMALAMMA V. RAMABHADRA GUPTA, ILR 1988

KAR 20.(DB) Mere payment on account of a debt or of interest before the expiration of the prescribed period of limitation by the person liable to pay the debt is not sufficient to extend the period of limitation under Section 19 of the Act, it must be followed by an acknowledgment of the payment in writing and signed by the person making the payment.

TECHNICAL VIEW OF THE MATTER WOULD BE TO ENCOURAGE DISHONESTY AND IMMORALITY IN LIFE

Bombay High Court in the case of R.Kumar and Co. Versus Chemicals Unlimited, AIR 2001 Bombay

116. Relevant portion of para 9 and 10 are reproduced as follows:- "9..... In my humble opinion, the Supreme Court has considered the similar point which is urged before me. It is held that an unconditional acknowledgement implies a promise to pay because that is the natural inference, if nothing is said to the contrary, The Supreme Court has further gone on to say "It is what every honest man would mean to do." Nothing more is required to be stated as the judgment is a complete reply to the contention raised on behalf of the defendants.10. According to me, to take any other narrow, pendantic or technical view of the matter would be to encourage dishonesty and immorality in life. I fail to understand how the defendants having written to the plaintiffs that certain amounts were shown payable by the defendants to the plaintiffs, can now turn about and say that no suit will lie for recovery of the said amounts shown to be the liability of the defendants towards the plaintiff. To accept such contention would amount to encourage and accept dishonesty and immorality. Times have changed. Courts of law have to watch with utmost care that the social life is not drifted to dishonesty and immorality and the people are not driven to anti-social elements and parallel

machinery of muscle power for recovery of genuine claims of honest people. The law is based on morals and if the foundation of the law is shaken or removed, there will be utter chaos in the society and in life. I may add here that such dishonest contentions by the debtors have given rise to parallel machinery of muscle power for recovery of the debts by the creditors."

FABRICATED ACKNOWLEDGEMENT

Canara Bank vs Vara Trading Co. And Ors. AIR 2006 Kant 88, The acknowledgements of debt produced in this case by the Bank are carefully scrutinized by us. Having regard to the finding recorded by the Trial Court on the contentious issues namely 1,3,6 and Additional Issue No. 9. Ex.Pl is the promissory note. It contains signature of one witness. His name is not clearly mentioned in the said document. The signatures of defendants 2 and 3 are found in the said document. Since they have denied the execution of promissory note as pleaded in the plaint, the initial burden is on the Bank to prove the same as required under Section 101 of the Evidence Act. The name of witness described in the said document is not clearly mentioned and it is also not known whether the said witness is examined or not and thereby the initial burden is not discharged by the Bank as the execution of this document is seriously disputed by the defendants No. 2 and 3. Merely

because the signatures are there on this document, it does not amount to accepting the liability of the overdraft facility extended to them in view of the specific denial of execution of promissory note Ex.P1 and acknowledgements of debt Exs.P4 to P6. we have to record that the Bank officers are public servants. After nationalization of banks, the trust is reposed in them to achieve the laudable object of Bank Nationalization. The manner in which the concerned officers of the Bank maintained the documents in this case shows their negligence. The same is most unsatisfactory. From a perusal of the promissory note, acknowledgements of debt due and also the letter of deposit of title deeds, Exfacie, it is a clear case of fabrication of documents subsequent to lending the loan which conduct of the officers of bank is highly deplorable and same is deprecated. We are conscious about the fact that plaintiff-bank is a nationalised bank. The Nationalization of Private Banks was made by the Union of India with an avowed object to see that operation of economic system does not result in concentration of wealth in a few individual but to subserve the common good in the constitutional philosophy as enshrined in the Article 39(b) and (c) of Part-IV of Constitution of India. The amount of negligence on the part of concerned officers of the Bank during the relevant period of time when the loan amount was sanctioned is not ignorable. The bank has not managed its affairs and business properly, effectively and efficiently thereby huge amount of

public money is wasted by its officers on account of their negligence and carelessness which aspect shall be borne in mind by the higher-ups of the Bank and give suitable directions to its officers for proper functioning.

ON SECTION 25 (3) OF CONTRACT ACT

In Devi Prasad v. Bhagwanti Prasad and Anr. AIR 1943 All 63 , considering the provisions of Section 25(3) of the Contract Act, the Court noted that the Section requires an express promise to pay and not merely an implied promise. The Court held ; An acknowledgment of a debt is a unilateral act of the debtor; it is not an agreement or a contract; it merely states that a debt is due and it contains no express promise to pay the debt acknowledged and, indeed, under Article 1, Schedule 1, Stamp Act, such a promise is excluded from the scope of an acknowledgment.

The Court also noted that There is a clear distinction between an acknowledgment of a debt simpliciter and an acknowledgment coupled with a statement that the debt acknowledged shall in future carry a certain rate of interest. In the former case there is no promise to pay the debt and the promise to pay the debt can only be implied; in the latter case the statement that the debt shall bear interest means and can only mean that the interest shall be paid and therefore exhibits a promise to pay the interest in

express terms, and if there is a promise to pay interest there exists clearly an agreement to pay principal. Taking this view, it is now generally held that when an acknowledgment of debt also contains a statement that the acknowledged debt will bear future interest at a certain rate it ceases to be a mere acknowledgment and becomes an agreement within the meaning of the Stamp Act.

Division Bench of Court in Balkrishna Mansukhram v. Jayshankar Narayan AIR 1938, Bombay 460 was considering the distinction between mere acknowledgment under Section 19 of the Limitation Act and a promise under Section 25(3) of the Contract Act. The Court observed: We think for the purpose of Section 25(3), Contract Act, there must be an express promise as opposed to an unconditional acknowledgment involving an implied promise to pay. There seems to be practically a consensus of judicial opinion on the point that a mere implied promise to pay, which may be conveyed by an unconditional acknowledgment, would not be sufficient for the purposes of Section 25(3).

Manekchand Mohanlal Poonawala v. Shah Bhimji Kundanmal & Co. and Ors. (1969) 71 BOMLR 370

The ratio of the decisions in those cases was that mere accounts stated or mere writings of acknowledgments which did not contain express promise for making payments were insufficient to complete a cause of

action for a suit on the basis of the provisions of Sub-section (3) of Section 25. Apparently, the ratio of these decisions is that a promise to revive a time-barred debt must be an express promise in writing for payment of the same. That was the condition required to be fulfilled having regard to the provisions of Sub-section (3) of Section 25. Now, the writing relied upon on behalf of the plaintiffs, in my view, is what is ordinarily known as a "Khata Pete receipt". This kind of writing has been known and understood to constitute not only an acknowledgement for receipt of the money but to contain an implied promise that the money having been received "Khata Pte" i.e. "on account" would be repaid by the debtor signing the writing.

**Bhartiya State Bank v. Bhanjan Singh AIR 2015
CHHATTISGARH 15**

In order to invoke the provisions of Section 25(3), the following conditions must be satisfied :

- (i) it must refer to a debt which the creditor but for the period of limitation, might have enforced;
- (ii) there must be a distinct promise to pay wholly or in part such debt;
- (iii) the promise must be in writing signed by the person or by his duly appointed agent.

The rule is founded on the principle that a pre-existing liability is a good consideration for a new promise. A moral obligation may be sufficient to sustain a promise, where the moral obligation is one

which has once been a valuable consideration, but has ceased to be binding from some supervent act of the law. A promise may be supported by a moral obligation, where the obligation grows out of an original legal obligation, that has been barred by the law of limitation without being performed. Where the consideration was originally beneficial to the party promising, but some provision of law confers upon him an advantage and protects him from liability, he may renounce the benefit of the law; and if he promises to pay such debt - what every honest man ought to do - he is bound by the law to perform it. The rule, however, has no application where the original right of action is extinguished not by the act of the law but by the act of the parties.

STATEMENT MADE BY A WITNESS IN THE COURT ADMITTING A TIME-BARRED DEBT

In AIR 1963 ANDHRA PRADESH 337 (LALAM SAMBAYYA V. PATTAM SHEMSHERKHAN), the question that arose for consideration, was whether a statement made by a witness in the Court admitting a time-barred debt, fulfills the requirements of Section 25(3) of the Contract Act? and it is relevant to extract paragraph Nos.5 and 6 as under:-

5.The ruling has no direct application and helps only to bring out that while a mere acknowledgement was sufficient for the purpose of

Section 19, Limitation Act, a promise to pay in writing was required to attract the provisions of Section 25(3) of the Contract Act. A careful perusal of the abovementioned provisions which have the effect of saving limitation, clearly makes out the essential differences between the two sections. Under Section 19 of the Limitation Act an acknowledgement of a subsisting debt addressed to a person other than the person entitled to the property or right is sufficient vide the Explanation I. - But Section 25(3) of the Contract Act contemplates a promise made in writing to pay a debt of which the creditor might have enforced payment but for the law for the limitation of suits. Under the Limitation Act an acknowledgement made in writing signed by the party and addressed to a person other than the person entitled to the property or right would save a subsisting debt. But Section 25(3) of the Contract Act contemplates a promise made in writing and signed by the person in favour of the creditor. The latter postulates a novation of the contract while the former provides for mere acknowledgement. In order to bring a deposition within the meaning of a fresh contract, the necessary ingredients of 'proposal and acceptance' with the consciousness of the purpose for which the contract is being entered into have to be clearly brought out.

6.It is well settled that in determining whether a particular statement is an acknowledgement or promise the language of the document has to be considered in every case. If it amounts to an

acknowledgement the writing would not be useful for the plaintiff under Section 25(3) of the Contract Act. The statement attributed to the petitioner and reproduced in the preceding paras appears to be nothing more than an acknowledgement. It is to be borne in mind that the said statement was made in the course of the cross-examination obviously with the intention of showing the motive which had led the petitioner to appear as a witness against the respondent. In other words, it was elicited to damage and destroy the evidentiary value of his deposition. A statement made in those circumstances cannot be placed on the same pedestal as a fresh contract, which to my mind involves a deliberate undertaking to renew a time-barred claim. Further, if the statement is to be taken on its face value it is no more than a proposal or an offer. Admittedly, it has not been made to the respondent and there is nothing on record to show that the respondent has accepted this offer so as to bring it within the definition of a contract. It cannot be urged from the subsequent notices that passed between the parties that the offer has been accepted nor could it be said that the advocate who was representing the respondent in the suit was an agent of the respondent and was competent to accept the offer on his behalf. On a consideration of these facts, I am not inclined to agree with the lower Court that the statement made by the petitioner came within the purview of Section 25(3) of the Contract Act.

IMPLIED PROMISE IN ACKNOWLEDGEMENT

Justice Ashutosh Kumar of Delhi High Court in the case of State Bank Of India vs Kanahiya Lal & Anr Decided on 2 May, 2016 - RSA 248/2015

No doubt, there is a distinction between an acknowledgement under Section 18 of the Limitation Act and a promise under Section 25 (3) of the Indian Contract Act inasmuch as though both have the effect of giving a fresh lease of life to the creditor to sue the debtor, but, for an acknowledgement under Section 18 of the Limitation Act to be applicable, the same must be made on or before the date of expiry of the period of limitation whereas such a condition is non-existent so far as the promise under Section 25 (3) of the Indian Contract Act is concerned. A promise under Clause 3 of Section 25 of the Indian Contract Act, even made after the expiry of the period of limitation would be applicable and would cause revival of the claim, notwithstanding the limitation. Under Section 25(3) of the Indian Contract Act, a promise in writing to pay in whole or in part, a time barred debt is not void. Section 9 of the Indian Contract Act provides that if the proposal of acceptance is made in words, the promise is said to be express but under other circumstances it remains an implied promise. "9. Promises, express and implied.--In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than

in words, the promise is said to be implied. " Thus implied promise is not unknown under the Indian Contract Act. The circumstances under which such an acknowledgement was made, viz. after the reminders by the Bank for repayment of the loan amount, further lends support to the hypothesis that the aforesaid letters are in the nature of a promise to pay. Prior to the aforesaid acknowledgements, there was a confirmation of the balance amount by the respondent/defendant. Any written acknowledgment after the confirmation of the balance amount can safely be treated as a promise to pay and not mere acknowledgement.

Delhi High Court in the case of Suresh Kumar Joon vs Mool Chand Motors & Ors. Decided on 22 August, 2012 in CS(OS) 389/2009

It is true that the cheque does not contain an express promise in writing, to pay the amount of the cheque to the payee or the cheque. However, Section 9 of the Indian Contract Act makes it very clear that the promise can be express as well as implied. In my view, when a debtor issues a cheque to his creditor, he makes an implied promise to him to pay the amount of the cheque being issued by him. It is only towards fulfillment of that such promise that a cheque is issued by the debtor to the creditor. Once it is alleged that the relationship between the parties was that of debtor and a creditor and it is further alleged that the cheque was issued by the debtor to the creditor, it

would be difficult to dispute that a cheque contains an implied promise, in writing, to pay the amount of the cheque. Since, even a time- barred debt is saved by Section 25(3) of the Indian Contract Act, 1872, the issuance of a cheque towards repayment of a time-barred debt constitutes a contract within the meaning of Section 25(3) of the Indian Contract Act, 1872. In taking this view, I find support from the decision of the Kerala High Court in Ramakrishnan v. Parthasaradhy [2003 (2) KLT 613] and the decision of Karnataka High Court in Adivelu (dead by L.Rs) vs. Narayanchari [2005(2) CLT 17(kar)]. In the case before the Kerala High Court, the Division Bench of the High Court, inter alia, observed and held as under: "13.....It is, undoubtedly, true that „to draw“ means to write and sign. However, even if the claim is barred by limitation on the date of the drawing of the cheque, on delivery to the other person, it becomes a valid consideration for another agreement.15.....It may, however, be mentioned that under Section 25(3), a promise can be made even in a case where the limitation for recovery of the amount has already expired. Such a promise has to be in writing. It can be in the form of a cheque...."

**TIME BARRED DEBTS CAN BE VALIDATED UNDER
SECTION 25 (3) CONTRACT ACT**

Naveen Chandra vs. S. Ramesh MANU/KA/1945 /2018

It is well known concept that where there is right, remedy is there ubi jus ibi remedium. When right is established or identified it carries the remedy which is the means of enforcement otherwise right has no value. On the other hand, in commercial transaction, certain rights loses their efficacy and enforceability because of the happening of certain events. For example, in a money transaction right to recover a debt by the lender is also a duty to repay of the borrower. However, when a period of three years is completed, right to recover debt gets expired and it would no more remain to be legally enforceable right. However, under Section 25(3) of the Indian Contract Act, 1872, it can be validated and terms to pay time barred debts is an exception to the Rule of consideration.But when there is no acknowledgement of debt becomes time barred and not enforceable. In the same way, for a person who lends money and carries on the business of money lending, he is termed to be a money lender and it is mandatory on his part to possess a valid money lending licence issued by the competent authority i.e. the Assistant Registrar of Money Lenders.This may not be applicable for an isolated transaction of lending or friendly borrowing which are totally not connected to money lending.Where it is regular money lending requires valid licence.

In Adivelu (dead by LRs) vs. Narainachari AIR 2005

Karnataka 236 while examining the provisions of Section 25(3) of the Indian Contract Act, inter alia, observed and held as under: "16. But, when the word „promise“, defined in Section 2(b) besides Section 9 of the Act are kept in mind with the decision of the Supreme Court in the case of Shapoor Freedom Mazda (supra) wherein it is held that an admission could be „express“ or „implied“, „promise“ covered by Section 25(3) of the Act, need not be „express“. If the legislature had intended that such promise should be an „express promise“ only, it would have indicated so but the word „express“ is not found in Section 25(3) of the Act. So, it would not be proper to read so and restrict the scope of Section 25(3) of the Act to "express promise" only..."

Madras High Court in A.R.M. Nizmathuallah vs.

Vaduganathan [2008 CrI.L.J. 880], wherein the High Court of Madras, inter alia, observed and held as under: "8. In view of Section 25(3) of the Act, when a debt has become barred by limitation, a written promise to pay, furnishes a fresh cause of action. Section 25 (3) of the Act in substance does is not a revive a dead right, resuscitate the right is never dead at any time, but to? the remedy to enforce payment by suit, and if the payment could be enforced by a suit, it means that it still has the character of legality enforceable debt, as contemplated by the explanation under Section 138 of the Act. In view of the Illustration

(e), the cheque becomes a promise made in writing, to pay under Section 25(3) of the Act".

Kerala High Court in Gopinathan v Sivadasan [2006(4) KLT 779], wherein the Court, inter alia, held as under: "8. Even assuming it to be time barred, when the cheque is written and signed, there is a promise to pay the amount to the payee, through the drawee of course. Such promise, even if the liability is barred, is valid and enforceable under law in view of Section 25(3) of the Contract Act. Thereafter, when the delivery takes place, the drawal is completed. Such cheque drawn is issued for the discharge of a liability, which is promised under the cheque itself. That being so, I do not find any reason to refer the matter to a Division Bench for further consideration. The argument of the learned Counsel for the petitioner that there must be another agreement - other than the cheque - in order to reckon the promise in the cheque to be a valid agreement for the purpose of Section 25(3) cannot obviously be accepted. The promise made in the cheque is an enforceable agreement as is directed in Section 25(3) of the Contract Act....."

In Sri Kapaleeswarar Temple, Mylapore Vs. T. Tirunavukarasu case AIR 1975 Mad 164 at Paragraph No.6, the Madras High Court was pleased to observe as below: "It is thus clear that there are a catena of decisions and plethora of authority for holding that though a debt might have become time-

barred on the date a debtor entered into a fresh obligation with the creditor to pay the liability, the said obligation, if it satisfies the conditions laid down in Section 25(3) of the Indian Contract Act, will amount to a fresh contract in the eye of law and can certainly be made the basis of an action for recovering the amount promised and R.S.A.No.896/2013 acknowledged therein by the debtor. While Section 18 of the Limitation Act (Section 19 of the old Act) deals with an acknowledgment made by a debtor within the period of limitation, the contractual obligation which a debtor enters into under the terms of Section 25(3) has no reference whatsoever to the acknowledged debt being within time or not. In that sense, the provision contained in Section 25(3) is far wider in scope than the acknowledgment contemplated in Section 18 of the Limitation Act. The contract entered into under Section 25(3) is an independent and enforceable contract and has no reference to the debt acknowledged under the contract being a live one in the sense that it had not become barred under the law of limitation.

A.V. Murthy Versus B/S. Nagabasaanna, (2002) 2 Supreme Court Cases 642

It is also pertinent to note that under sub- section (3) of Section 25 of the Indian Contract Act, 1872, a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the

creditor might have enforced payment but for the law for the limitation of suits, is a valid contract. Moreover, in the instant, the appellant has submitted before us that the respondent, in his balance sheet prepared for every year subsequent to the loan advanced by the appellant, had shown the amount as deposits from friends. A copy of the balance sheet as on 31st March 1997 is also produced before us. If the amount borrowed by the respondent is shown in the balance sheet, it may amount to acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement was made. However, we do not express any final opinion on all these aspects, as these are matters to be agitated before the Magistrate by way of defence of the respondent.

IN INDIA DEBT CAN BE ACKNOWLEDGED EVEN AFTER IT IS BARRED UNDER LAW

Shadiram v. Prabhu, AIR 1953 Punj 28:--

In India, a signed acknowledgment of liability made in writing before the expiration of the period of limitation is enough to start a fresh period of limitation, and it is enough not only when the acknowledgment is unconditional but even when the acknowledgment is coupled with a refusal to pay. When the debt has become barred by limitation there is Section 25(3) of the Contract Act and there can be no doubt under the section itself that the written promise to pay falling

within this furnishes a fresh cause of action. The doctrine that an acknowledgment without written promise made before the expiry of the period of limitation should furnish a fresh cause of action is for India quite unnecessary.

FOR PROTECTION OF ILLITERATE DEBTORS SECTION 25(3) APPLICABILITY DISCOURAGED

Privy Council, particularly in Maniram v. Seth Rupchand, 33 IA 165, (PC) of the rules of English Law now considered well established, namely that an unconditional acknowledgment by a debtor contains an implied promise to pay and further furnishes to the creditor a fresh cause of action..... I have had some experience of the unfortunate results of the importation of the rule of fresh cause of action. In places where the ignorant and illiterate debtor is not protected by legislation which not only enables but requires the Courts to go behind transactions and ascertain their true nature, the debtor having given successive acknowledgments of amounts rising in rapid progression has often found himself ruined by a suit based on the latest acknowledgment without the Court having inquired into the true nature of the transaction. The general law contained in the Usurious Loans Act is not always enough to afford protection. Conditions in India are by no means the same as in England.

Jeevraj And Anr. vs Lalchand And Ors. AIR 1969 Raj 192 (FB)(Minority view) 21.

Even apart from considerations of justice and equity, I see a formidable legal difficulty in subscribing to the view that the suit can be based on an unconditional acknowledgment. The language of Section 19 of the old Limitation Act and Section 18 of the new Indian Limitation Act shows that if a creditor brings a suit which is time-barred if computed from the date of the original cause of action and wants to avail of an acknowledgment in order to save limitation, that acknowledgment must have been obtained before the date of expiry of the period of limitation. If the plaintiff brings the suit on the original cause of action and seeks to extend the period of limitation on the basis of conditional or unconditional acknowledgment, he will have to show that the acknowledgment was obtained by him before the period of limitation had expired. In other words, the section itself envisages that the burden of proving that the acknowledgment was made within the period of limitation is on the creditor.

Now, if it is held that a suit could be based on an unconditional acknowledgment, the creditor would be relieved of the necessity of proving that it was obtained within the period of limitation and the burden would shift to the debtor to show that it was time-barred. It would be an anomalous position that the person who brings the suit on the original cause of action will have to show even in the case of an unconditional acknowledgment that it was obtained

within the period of limitation, while if he bases his suit on an unconditional acknowledgment he would be in a better position. The net result of holding that a suit can be based on an unconditional acknowledgment would be that even if the acknowledgment has been obtained in respect of time-barred debts, the burden would lie on the debtor to prove that the debt which was acknowledged was time-barred on the date of its execution.

It is well known that debtors generally belong to poorer classes and, in most cases, they are even illiterate. The accounts always remain with the creditors. If the creditor bases his suit on the original cause of action and uses the acknowledgment, conditional or unconditional, for purposes of saving limitation, he would not be deprived of justice for that reason alone. His only botheration may be to first disclose his original cause of action and then show how the acknowledgment had saved the debt from being time-barred. It was urged that a debtor on whom burden is cast may as well ask the creditor to produce his account books. In my opinion, this argument may not help the debtor because the creditor may say that his account books are lost or destroyed or he may put forward any other excuse. The provisions of Section 25(3) of the Contract Act would be rendered nugatory in many cases. On the contrary, the creditor stands nothing to lose if he bases his suit on the original cause of action and uses the acknowledgment,

conditional or unconditional, for extending the period of limitation.

Jeevraj And Anr. vs Lalchand And Ors. AIR 1969

Raj 192 (FB) (Majority view) Now an acknowledgment will be effective under Section 19 even if it does not contain a promise to pay whether express or implied. It will be effective even when it is accompanied by a refusal to pay or even when it is coupled with a claim to a set-off. It may be addressed to a person other than a person entitled to the property or right. An acknowledgment under Section 19 does not create any contract. It merely extends the period of limitation for a suit or application in respect of any property or right so acknowledged. It is for this reason that it is said that an acknowledgment cannot form the basis of the suit because the suit must disclose the facts constituting the basis of the claim of the plaintiff. It may, however, be mentioned that there is a specific provision in Article 64 which provides for three years' limitation from the date when the accounts are stated between the parties, Such a suit is called a "suit based on accounts stated". Now, let us examine the circumstances under which a mere acknowledgment can form the basis of the suit. Obviously such a document in order to form the basis of the suit must be an agreement under which the defendant has to pay a particular sum of money to the plaintiff. An acknowledgment under Section 19 may be a unilateral transaction. It may be an act on the

part of the defendant to which the plaintiff had not signified his assent. Such a unilateral act may be good acknowledgment if conditions of Section 19 are satisfied. For example, the debtor may send a letter to the creditor acknowledging his liability or the debtor may make a statement in a Court acknowledging that he is liable to pay a certain amount or that he may make a mention in any other document that he is liable to pay a certain amount to the creditors.

All these acts are of the result of unilateral acts of the defendant but they become an acknowledgment if the conditions under Section 19 are satisfied. These acts do not amount to an agreement and on the basis of such a document no suit can be filed. But a document may be bilateral in nature under which the defendant acknowledges his liability to pay a certain amount to the creditor. If such a document contains an express promise to pay, there will be little room for the contention that it cannot form the basis of the suit. We have, however, to examine a case in which there is no express promise to pay but there is an unconditional acknowledgment that a particular amount is due. There are two views possible to take in such a case. The one is that mere admission of liability does not contain even an implied promise to pay, and, therefore, it cannot be any agreement under the provisions of the Indian Contract Act. The other view is that it imports an implied promise to pay, and, therefore, it is as good an agreement under the Indian Contract Act as any other agreement, and if such an

agreement is enforceable at law under the provisions of the Contract Act, a suit can be founded on it.

It has been urged before us that the doctrine that an acknowledgment implies a promise to pay is peculiar to English law and should not be imported in India. But below case explains how it is relevant in India also.

Surendra Prasad v. Gajadhar Prasad, AIR 1940 FC 10, their Lordships of the Federal Court, while construing the word 'bond' in Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939) observed as follows:-- "If the promise to pay is to be inferred by implication, then the document may amount to acknowledgment of liability or adjustment, or even account stated Thus the view that an unconditional acknowledgment implies a promise to pay cannot be considered to be peculiar to England. **If the presumption that a debtor intends to pay what he acknowledges unconditionally can be drawn in England, there is much more ground for drawing such a presumption in India for the reason that an Indian not only considers payment of debt a part of his legal duty but also of his religious obligation.**

WHETHER SUMMARY SUITS BE FILED ON ACKNOWLEDGEMENT OF DEBTS

Bombay High Court in case of Jyotsna K. Valia vs T.S. Parekh And Co. 2007 (4) MhLj 517 (FB) In so far as acknowledgements writing or receipt are

concerned, considering the various judgments adverted to earlier on behalf of the plaintiffs and Defendants and the discussion, it is not possible to lay down any precise test as to when a Summary Suit would lie on an acknowledgement writting or receipt. That would depend firstly on the document itself, the practice, usage and customs of the trade as also the facts of each case. By so holding it is not as if the Defendant is denuded of his defences when he applies for leave to defend. The Supreme Court in *Machalec Engineering and Manufacturers v. Basic Equipment Corporation* AIR 1965 SC. 1698 has laid down the tests, which thereafter have been reiterated by the Supreme Court in *Sunil Enterprises v. S.B.I. Commercial and International Bank Ltd.* AIR 1998 SC 2317. The tests laid down are as under:

- (a) If the defendant satisfies the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.
- (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.
- (c) If the defendant discloses such facts may be sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiffs claim the Court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or mode

of trial but not as to payment in to Court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moon-shine, the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moon-shine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured.

The Supreme Court in IDBI Trusteeship Services Ltd. Vs. Hubtown Limited, (2017) 1 SCC 568 has laid down the following principles:-

"17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues, the trial Judge may impose conditions both as to time

or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17.4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

In Santosh Kumar versus Bhai Mool Singh
MANU/SC/0013/1958 : AIR 1958 SC 321, Hon'ble
Apex Court held as under:-

"11. Now, what is the position here? The defendants admitted execution of the cheque but pleaded that it was only given as collateral security for the price of goods which the plaintiff supplied to the defendants. They said that those goods were paid for by cash payments made from time to time and by other cheques and that therefore the cheque in suit had served its end and should now be returned. They set out the exact dates on which, according to them, the payments had been made and gave the numbers of the cheques.

(11A). This at once raised an issue of fact, the truth and good faith of which could only be tested by going into the evidence and, as we have pointed out, the learned trial Judge held that this defence did raise a triable issue. But he held that it was not enough for the defendants to back up their assertions with an affidavit; they should also have produced writings and documents which they said were in their possession and which they asserted would prove that the cheques and payments referred to in their defence were given in payment of the cheque in suit; and he said "In the absence of those documents, the defence of the defendants seems to be vague consisting of indefinite assertions....." This is a surprising conclusion. The facts given in the affidavit are clear and precise, the defence could hardly have been clearer. We find it difficult to see how a defence that, on the face of it, is clear becomes vague simply because the evidence by

which it is to be proved is not brought on file at the time the defence is put in."

12. The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the Court has to determine is whether "if the facts alleged by the defendant are duly proved" they will afford a good, or even a plausible, answer to the plaintiff's claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains."

In Sunil Enterprises and another versus SBI Commercial & International Bank Ltd MANU/SC/0334/1998 : (1998) 5 SCC 354, Hon'ble Apex Court held as under:-

"3. In this appeal it is contended that what should be examined at the stage of grant of leave to defend is whether there was a real or a sham defence and whether the facts alleged by the appellants if established would be a good defence and the trial court should go into the question whether the facts alleged were true or not, as that situation would arise only after leave was granted and at the trial. That a condition as to security could be imposed if the Court

was of the opinion that the defence was out forward with a view to prolong this suit.

4. The position in law has been explained by this Court in Santosh Kumar v. Bhai Moot Singh, Milkhiram (India (P) Ltd. v. Chamanlal Bros, and Mechelec Engineer & Manufacturers v. Basic Equipment Corpn. The propositions laid down in these decisions may be summed up as follows:-

(a) If the defendant satisfies the Court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit disclosed that at the trial he may be able to establish a defence to the plaintiff claim, the court may impose conditions at the time of granting leave to defend-the conditions being as to time of trial or mode of trial but not as to payment into Court or furnishing security

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the Court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the

plaintiff imposing the condition that the amount claimed should be paid into Court or otherwise secured. In fact in identical matters on the file of the said High Court in summary suit No., leave to defend had been granted to defendants."

CLERICAL ERROR IN ACKNOWLEDGEMENT DOES NOT MAKE IT FABRICATED ONE

Syndicate Bank v. S. R. Subramaniam. AIR 2008 (NOC) 1102 (MAD) In this case Respondent had borrowed money from appellant bank. Subsequently, by two acknowledgments of debts the respondent has admittedly extended his liability by specifying loan account number and amount due. One of acknowledgments of debt, extended before expiry of the time limit, from date of earlier acknowledgment and subsequently, within time limit, suit has been filed. Merely on ground of clerical error, in stating a lesser amount in subsequent acknowledgments, it would neither make document a fabricated one nor make it invalid

CLAIMS EVEN AFTER ISSUING NO DUES CERTIFICATE IN MATTER OF CONTRACTS

**R.L. Kalathia and Co. vs. State of Gujarat:
MANU/SC/0050/2011**

(i) Merely because the contractor has issued "No Due Certificate", if there is acceptable claim, the court cannot reject the same on the ground of issuance of "No Due Certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "No-claim Certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party able to establish that he is entitled to further amount for which he is having adequate materials, is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing 'No Due Certificate'.

**In National Insurance Company Limited v.
Boghara Polyfab Private Ltd.**

MANU/SC/4056/2008 : (2009) 1 SCC 267, the question involved was whether a dispute raised by an insured, after giving a full and final discharge voucher to the insurer, can be referred to arbitration. The following conclusion in para 26 is relevant: When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and

final discharge voucher/receipt by one of the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable.

Chairman and MD, NTPC Ltd. v. Reshmi Constructions, Builders and Contractors
MANU/SC/0003/2004 : (2004) 2 SCC 663, which relates to termination of a contract, one of the questions that arose for consideration was "Whether after the contract comes to an end by completion of the contract work and acceptance of the final bill in full and final satisfaction and after issuance a 'No Due Certificate' by the contractor, can any party to the contract raise any dispute for reference to arbitration? While answering the said issue this Court held: Even when rights and obligations of the parties are worked out, the contract does not come to an end inter alia for the purpose of determination of the disputes arising thereunder, and, thus, the arbitration agreement can be invoked. Although it may not be strictly in place but we cannot shut our eyes to the

ground reality that in a case where a contractor has made huge investment, he cannot afford not to take from the employer the amount under the bills, for various reasons which may include discharge of his liability towards the banks, financial institutions and other persons. In such a situation, the public sector undertakings would have an upper hand. They would not ordinarily release the money unless a "No-Demand Certificate" is signed. Each case, therefore, is required to be considered on its own facts. Further, *necessitas non habet legem* is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position.

CHAPTER - 14

SARFAESI ACT AND DRT RECOVERY MATTERS

MEANING OF -DEBT - UNDER RECOVERY ACT 1993

Eureka Forbes Limited vs. Allahabad Bank and Ors.

2010 (6) SCC 193 Section 2(g) of the Recovery Act reads as under: "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application;

The Recovery Act of 1993, was enacted primarily for the reasons that, the Banks and financial institutions should be able to recover their dues without unnecessary delay, so as to avoid any adverse consequences in relation to the public funds. The Statement of Objects and Reasons of this Act clearly state that Banks and financial institutions at present, experience considerable difficulties in recovering loans and enforcements of securities charged with

them. The existing procedure for recovery of dues of the Bank and the financial institutions block significant portion of their funds in un-productive assets, the value of which deteriorates with the passage of time.....

In this background, let us read the language of Section 2(g) of the Recovery Act. The plain reading of the Section suggests that legislature has used a general expression in contra distinction to specific, restricted or limited expression. This obviously means that, the legislature intended to give wider meaning to the provisions. Larger area of jurisdiction was intended to be covered under this provision so as to ensure attainment of the legislative object, i.e. expeditious recovery and providing provisions for taking such measures which would prevent the wastage of securities available with the banks and financial institutions.

We may notice some of the general expressions used by the framers of law in this provision:

- a) any liability;
- b) claim as due from any person;
- c) during the course of any business activity undertaken by the Bank;
- d) where secured or unsecured;
- e) and lastly legally recoverable.

All the above expressions used in the definition clause clearly suggest that, expression `debt' has to be given general and wider meaning, just to illustrate, the word `any liability' as opposed to the word `determined

liability' or 'definite liability' or 'any person' in contrast to 'from the debtor'. The expression 'any person' shows that the framers do not wish to restrict the same in its ambit or application. The legislature has not intended to restrict to the relationship of a creditor or debtor alone. General terms, therefore, have been used by the legislature to give the provision a wider and liberal meaning. These are generic or general terms. Therefore, it will be difficult for the Court, even on cumulative reading of the provision, to hold that the expression should be given a narrower or restricted meaning. What will be more in consonance with the purpose and object of the Act is to give this expression a general meaning on its plain language rather than apply unnecessary emphasis or narrow the scope and interpretation of these provisions, as they are likely to frustrate the very object of the Act.

THE WORD PERSON INCLUDES JOINT FAMILY

Raman Lal Bhailal Patel and Ors. v. State of Gujarat MANU/SC/7119/2008 : (2008) 5 SCC 449, Court was dealing with the word 'person' appearing in the provisions of Gujarat Agricultural Land Ceiling Act, 1960. The expression 'person' was defined with the inclusive definition that a person includes a joint family. The Court held that, where the definition is inclusively defining the word, there, the legislative intention is clear that it wishes to enlarge the meaning

of the word used in the statute and that such word must be given comprehensive meaning. In law, the word 'person' was stated to be having a slightly different connotation and refers to any entity that is recognized by law as having rights and duties of human beings.

Eureka Forbes Limited vs. Allahabad Bank and Ors.

2010 (6) SCC 193The word 'debt' under Section 2(g) of the Recovery Act is incapable of being given a restricted or narrow meaning. The legislature has used general terms which must be given appropriate plain and simple meaning. There is no occasion for the Court to restrict the meaning of the word 'any liability', 'any person' and particularly the words 'in cash or otherwise'. Under Section 2(g), a claim has to be raised by the Bank against any person which is due to Bank on account of/in the course of any business activity undertaken by the Bank..... There is no occasion for this Court to read the word other than the one intended by the legislature in the provisions of Section 2(g) of the Recovery Act. Wherever the legislature requires, it uses the expressions of definite connotations and consequences, for example, in the Interest Act, 1978, the word 'debt' has been defined under Section 2(c) of that Act by using specific terms of restricted character. It means 'any liability for an 'ascertained sum' of money and includes a debt payable in any kind but does not include a 'judgment debt'. In this

definition, the 'ascertained sum' obviously means a sum which has been determined under any methods of the adjudicative process while, on the other hand, the expression 'payable in kind' is a general expression, again the excluding clause in relation to 'judgment debt' is specific. Such is not the language or the purport of Section 2(g) of the Recovery Act.

DRT RECOVERY DECREE IS APPEALABLE – NOT AMENABLE TO WRIT JURISDICTION – DEBT RECOVERY AND TAKING POSSESSION EXPLAINED

Supreme Court, in Punjab National Bank v. O.C Krishnan AIR 2001 SC 3208. In that case, a suit was filed by the appellant for recovery of money from the principal debtor as well as the guarantors. The suit was transferred to the Debts Recovery Tribunal and thereafter on 17-5-1996, a decree was passed by the Debts Recovery Tribunal, Calcutta. A certificate was also issued to recover the amount. The respondent who was a guarantor and whose property was stated to have mortgaged filed a petition under Article 227 before the High Court at Calcutta. The High Court allowed the petition by observing that as the mortgaged property was situated in Chennai, the Debts Recovery Tribunal had no territorial jurisdiction in respect thereto and it could not have directed sale of mortgaged property. It, accordingly, held that the bank would be at liberty to proceed against Defendant No. 4, respondent therein, in appropriate forum for

recovery of debts by sale of mortgaged property. In that circumstance, the Punjab National Bank has filed an appeal before the Supreme Court. After considering the rival contentions and in the light of the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Rules made thereunder as well as the jurisdiction of the High Courts under articles 226 and 227 of the Constitution of India, Their Lordships have held : "5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('the Act'). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum. 6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution,

nevertheless when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

In Industrial Credit & Investment Corporation. of India Ltd. v. Grapco Industrial Ltd. , AIR 1999 SC 1975, the Hon'ble Supreme Court has held that the High Court can interfere with interim orders of the Courts and Tribunals while exercising jurisdiction under Article 227 of the Constitution if the order is made without jurisdiction. However, the order under challenge is not an interim order, nor the Debts Recovery Tribunal has no jurisdiction to pass such order.

Bench in Commissioner of Sales Tax, M.P. & Ors. v. Radhakrishnan & Ors. AIR 1979 SC 1588:- ..a firm in a partnership and a Hindu undivided family are recognised as legal entities and as such proceedings can only be taken against the firm or undivided family as the case may be. Neither the partners of the firm nor the members of the Hindu undivided family will be liable for the tax assessed against the firm or the undivided Hindu family.

In Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and others [(2000) 5 SCC 694], the Court

reviewed case law on the subject and observed: “The principle of priority of government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well-recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues (see Builders Supply Corpn.). In the same case the Constitution Bench has noticed a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts and that this rule of common law amounts to law in force in the territory of British India at the relevant time within the meaning of Article 372(1) of the Constitution of India and therefore continues to be in force thereafter. On the very principle on which the rule is founded, the priority would be available only to such debts as are incurred by the subjects of the Crown by reference to the State's sovereign power of compulsory exaction and would not extend to charges for commercial

services or obligation incurred by the subjects to the State pursuant to commercial transactions. Having reviewed the available judicial pronouncements their Lordships have summed up the law as under:

1. There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.
2. The common law doctrine about priority of Crown debts which was recognised by Indian High Courts prior to 1950 constitutes "law in force" within the meaning of Article 372(1) and continues to be in force.
3. The basic justification for the claim for priority of State debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.
4. The doctrine may not apply in respect of debts due to the State if they are contracted by citizens in relation to commercial activities which may be undertaken by the State for achieving socio-economic good. In other words, where the welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic government functions of the State and seeks to recover debts from its debtors arising out of such commercial activities the applicability of the doctrine of priority shall be open for consideration."

In Transcore v. Union of India (2008) 1 SCC 125 a two-Judge Bench made detailed analyses of the

provisions of the DRT Act and formulated the following points for consideration:-

(i) Whether the banks or financial institutions having elected to seek their remedy in terms of the DRT Act, 1993 can still invoke the NPA Act, 2002 for realising the secured assets without withdrawing or abandoning the OA filed before DRT under the DRT Act.

(ii) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

(iii) Whether ad valorem court fee prescribed under Rule 7 of the DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the said Act. In dealing with the afore-mentioned questions, the Court noticed the arguments of learned counsel for the parties and proceeded to observe:-

“Keeping in mind the above circumstances, the NPA Act is enacted for quick enforcement of the security. The said Act deals with enforcement of the rights vested in the bank/FI. The NPA Act proceeds on the basis that security interest vests in the bank/FI. Sections 5 and 9 of the NPA Act are also important for preservation of the value of the assets of the banks/FIs. Quick recovery of debt is important. It is the object of the DRT Act as well as the NPA Act. But under the NPA Act, authority is given to the banks/FIs, which is not there in the DRT Act, to

assign the secured interest to securitisation company/asset reconstruction company. In cases where the borrower has bought an asset with the finance of the bank/FI, the latter is treated as a lender and on assignment the securitisation company/asset reconstruction company steps into the shoes of the lender bank/FI and it can recover the lent amounts from the borrower. Therefore, when Section 13(4) talks about taking possession of the secured assets or management of the business of the borrower, it is because a right is created by the borrower in favour of the bank/FI when he takes a loan secured by pledge, hypothecation, mortgage or charge. For example, when a company takes a loan and pledges its financial asset, it is the duty of that company to see that the margin between what the company borrows and the extent to which the loan is covered by the value of the financial asset hypothecated is retained. If the borrower company does not repay, becomes a defaulter and does not keep up the value of the financial asset which depletes then the borrower fails in its obligation which results in a mismatch between the asset and the liability in the books of the bank/FI. Therefore, Sections 5 and 9 talk of acquisition of the secured interest so that the balance sheet of the bank/FI remains clean. Same applies to immovable property charged or mortgaged to the bank/FI. These are some of the factors which the authorised officer of the bank/FI has to keep in mind when he gives notice under Section 13(2) of the NPA Act. Hence, equity

exists in the bank/FI and not in the borrower. Therefore, apart from obligation to repay, the borrower undertakes to keep the margin and the value of the securities hypothecated so that there is no mismatch between the asset- liability in the books of the bank/FI. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of the NPA Act which seeks to enforce it by measures mentioned in Section 13(4) of the NPA Act, which measures are not contemplated by the DRT Act and, therefore, it is wrong to say that the two Acts provide parallel remedies as held by the judgment of the High Court in Kalyani Sales Co. As stated, the remedy under the DRT Act falls short as compared to the NPA Act which refers to acquisition and assignment of the receivables to the asset reconstruction company and which authorises banks/FIs to take possession or to take over management which is not there in the DRT Act. It is for this reason that the NPA Act is treated as an additional remedy (Section 37), which is not inconsistent with the DRT Act.”

The Court then adverted to the concept of possession envisaged under Section 13(4) and held: “The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the NPA Act. Basically, the NPA Act deals with the mortgage type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property

concerned. It is for this reason that the NPA Act ousts the intervention of the courts/tribunals. Section 13(4-A) refers to the word “possession”; simpliciter. There is no dichotomy in Section 13(4-A) as pleaded on behalf of the borrowers. The scheme of Section 13(4) read with Section 17(3) of the NPA Act shows that if the borrower is dispossessed, not in accordance with the provisions of the NPA Act, then DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon are defeated by the authorised officer taking possession. The NPA Act provides for recovery of possession by non-adjudicatory process; therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8 of the Security Interest (Enforcement) Rules, 2002 “2002 Rules” deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a Court Receiver under Order 40 Rule 1 CPC. The Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds that a third-party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorised officer under Rule 8 has greater powers than even a Court Receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be

protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third-party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules.”

Full Bench judgment of Hyderabad High Court rendered in **M/s. T.R. Jewellery and another v. M/s. State Bank of India and another; MANU/AP/0754/2015 : AIR 2016 HYDERABAD 125** held that the term District Magistrate will include the Additional District Magistrate or Additional Collector. The relevant extract of the said judgment is quoted herein below: "27. Relying upon the word order used in the proviso to Section 14, it has been urged, that the Chief Metropolitan Magistrate is exercising judicial function while assisting the secured creditor and the same cannot be entrusted to Chief Judicial Magistrate in non-metropolitan area when the Legislature never contemplated the same. It has been further urged that if really the intention of the Legislature was to give such power to Chief Judicial Magistrate, it would have

referred to it atleast in the amendment brought to Section 14 in the year 2013. It is true that Section 14 of the Act refers only to Chief Metropolitan Magistrate and District Magistrate. But, if really the proceedings before the Chief Metropolitan Magistrate are judicial in nature, the Legislature would not have allowed the District Magistrate or the Chief Metropolitan Magistrate to authorize any Officer subordinate to them to take possession of such assets and documents relating there to and forward such assets and documents to the secured creditor. At this stage, an argument was sought to be advanced, stating that delegation as referred to in Section 14(1A) is only with regard to execution of the order by an Officer subordinate to Chief Metropolitan Magistrate or District Magistrate and not passing of the order. The same cannot be accepted. It is to be noted that Section 14(1)(a)(b) which deal with assistance by Chief Metropolitan Magistrate and District Magistrate also refers to taking possession of such assets and documents and forwarding them to the secured creditor.

28. Dealing with the word possession in Sections 13, 17 and the Rules made under SARFAESI Act, the Apex Court in *Transcore v. Union of India (UOI)* and another, held as under: 68. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by

which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/tribunals.

29. In *Union Bank of India v. The State of Maharashtra through the Office of the Government Pleader, Public Works Department and others*, the Bombay High Court held that Section 14 of the SARFAESI Act is procedural in nature and that the procedure stipulated therein enables the secured creditor to take the assistance of Chief Metropolitan Magistrate or District Magistrate in taking possession of the secured assets. It was also held that Section 14 only empowers the authorities to assist the secured creditor in taking possession of the secured assets as per the procedure contemplated under Section 14, but does not clothe the District Magistrate with the power to adjudicate in respect of any dispute pertaining to any secured asset. Further, it has been held that proviso to Section 14 of the Act does not vest District Magistrate with the jurisdiction to adjudicate and decide any dispute regarding the secured assets. Similar view was taken by a Division Bench of Bombay High Court in *International Asset Reconstruction*

Company Private Limited through its Authorized Representative of the Constituted Attorney Shri Tushar B. Patel v. Union of India (UOI), through the District Magistrate and others. In Mansa Synthetic Pvt. Ltd. and others v. Union of India and another, a Division Bench of the Gujarat High Court held that the District Magistrate or Chief Metropolitan Magistrate is bound to assist secured creditor in taking possession of secured asset and is not empowered to decide question of legality or propriety of any action taken by the secured creditor under Section 14 of the Act."

WRIT PETITION CHALLENGING THE NOTICE ISSUED BY THE BANK UNDER SECTION 13 OF THE ACT IS NOT MAINTAINABLE

Honourable Supreme Court reported in (Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others) 2011 2 SCC 782 wherein it was held that the writ petition challenging the notice issued by the bank under Section 13 of the Act is not maintainable. In that case before the Honourable Supreme Court, it was contended by the borrower that the notice under Section 13 (2) of the Act, said to have been issued by the bank, was not at all received and therefore the consequential order of the Chief Judicial Magistrate passed under Section 14 of the Act was invalid. In that context, the Honourable Supreme Court had categorically held that when there is

alternative and efficacious remedy available under Section 17 of the Act before the Debt Recovery Tribunal, the writ petition is not a proper remedy and it is not maintainable.

Apex Court in the case of Authorized Officer, State Bank of Travancore and another v. Mathew K.C.

AIR 2018 SC 676 The SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loathe to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution

ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well defined exceptions as observed in Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal, 2014 (1) SCC 603, as follows: “15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.” The Section 13(4) notice along with possession notice under Rule 8 was issued on 21.04.2015. The remedy under Section 17 of the SARFAESI Act was now available to the Respondent if aggrieved. These developments were not brought on record or placed before the Court when the impugned

interim order came to be passed on 24.04.2015. The writ petition was clearly not instituted bonafide, but patently to stall further action for recovery. There is no pleading why the remedy available under Section 17 of the Act before the Debt Recovery Tribunal was not efficacious and the compelling reasons for by-passing the same. Unfortunately, the High Court also did not dwell upon the same or record any special reasons for grant of interim relief by direction to deposit.

**UNDER DRT ACT CIVIL COURT JURISDICTION
OUSTED FOR ONLY IN MATTERS UNDER SECTION
18:-**

In NAHAR INDUSTRIAL ENTERPRISES LTD. VS. HONG KONG AND SHANGHAI BANKING CORPORATION, (2009) 8 SCC 646, the Honourable Supreme Court considered the question of exclusion of jurisdiction and matters pertaining to DRT and the scope of Sections 17 and 18 of RDDB Act. Referring to DHULABHAI VS. STATE OF MADHYA PRADESH, (AIR 1969 SC 78), and other cases, the Supreme Court in the above said judgment held as under: “105. The Civil Court indisputably has the jurisdiction to try a suit. If the suit is vexatious or otherwise not maintainable action can be taken in respect thereof in terms of the Code. But if all suits filed in the Civil Courts, whether inextricably connected with the application filed before the DRT by the banks and financial institutions are transferred, the same would

amount to ousting the jurisdiction of the Civil Courts indirectly. Suits filed by the debtor may or may not be counter claims to the claims filed by banks or financial institutions but for that purpose consent of the Plaintiff is necessary.

106. It is furthermore difficult to accept the contentions of the Respondents that the statutory provisions contained in Section 17 and 18 of the DRT Act have ousted the jurisdiction of the civil court as the said provisions clearly state that the jurisdiction of the civil court is barred in relation only to applications from banks and financial institutions for recovery of debts due to such banks and financial institutions.

108. Although some arguments have been advanced before us whether having regard to the provisions of Sections 17 and 18 of the Act the civil court jurisdiction is completely ousted, we are of the view that the jurisdiction of the civil court would be ousted only in respect of the matters contained in Section 18 which has a direct co-relation with Section 17 thereof, that is to say that the matter must relate to a debt payable to a bank or a financial institution. The application before the Tribunal would lie only at the instance of the bank or the financial institution for the recovery of its debt. It must further be noted in this respect that had the jurisdiction of the civil courts been barred in respect of counterclaim also, the statute would have said so and Sections 17 and 18

would have been amended to introduce the provision of counterclaim.

117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17 and 18 of the Act, it is difficult to hold that a civil court's jurisdiction is completely ousted....

118. The liabilities and rights of the parties have not been created under the Act. Only a new forum has been created. The banks and the financial institutions cannot approach the Tribunal unless the debt has become due. In such a contingency, indisputably a civil suit would lie. There is a possibility that the debtor may file pre-emptive suits and obtain orders of injunction, but the same alone, in our opinion, by itself cannot be held to be a ground to completely oust the jurisdiction of the civil court in the teeth of Section 9 of the Code. Recourse to the other provisions of the Code will have to be resorted to for redressal of his individual grievances.

CIVIL COURT JURISDICTION AND FRAUDULENT ACTS OF CREDITOR

Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India II (2004) BC 397 (SC) : 110 (2004) DLT 665 (SC) : 2004(5) All MR (SC) 484, 2003 (6) SCALE 7 whereby the Supreme Court has upheld the provisions of the said Act ousting the jurisdiction of Civil Court in the matters to which the provisions of the Securitization Act apply. From the provisions of

Sub-section (1) of Section 13 of the Securitization Act quoted above, it is clear that the provisions of Sections 69 and 69A of the Transfer of Property Act, which pertain to the power of the mortgagee for sale and appointment of Receiver in respect of mortgaged property are excluded or overridden by Section 13(1) of the Securitization Act.

Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under section 13(4) of the Act have been taken, a mechanism has been provided under section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows :

1. Under sub-section (2) of section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be

for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under section 17 of the Act before the Debt Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75 per cent of amount claimed before entertaining an appeal (petition) under section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the Court.

TO WHAT EXTENT JURISDICTION OF CIVIL COURT BARRED UNDER SECURITIZATION ACT

Supreme Court in the case of *Mardia Chemicals Ltd. v. Union of India II* (2004) BC 397 (SC) : 110 (2004) DLT 665 (SC) : 2004(5) All MR (SC) 484, 2003 (6) SCALE 7 A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of section.

However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages.

Madras High Court in *V. Narasimhachariar v. Egmore Benefit Society, 3rd Branch Ltd.* AIR 1955 Mad. 135, "22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are two fold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms

of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought : *Adams v. Scott* (1859) 7 WR (Eng) 213 (249). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely.

Where a borrower tenders to the creditor the amount due with costs and expenses incurred, no further steps for sale of the property are to take place. In this connection, a reference has also been made by the learned Attorney General to a decision in *Naraindas Karsondas V. S.A. Kamtam* (1977) 3 SCC 247, which provides that a mortgagor can exercise his right of redemption any time until the final sale of the property by execution of a conveyance.

**IRRESPECTIVE OF THE KIND OF THE MORTGAGE
THE SECURED INTEREST IS LIABLE TO BE
ENFORCED WITHOUT INTERVENTION OF THE
COURT AS PER THE PROVISION CONTAINED
UNDER SECTION 13 OF THE ACT**

Supreme Court in the case of *Mardia Chemicals Ltd. v. Union of India II* (2004) BC 397 (SC) : 110 (2004) DLT 665 (SC) : 2004(5) All MR (SC) 484, 2003 (6) SCALE 7 In English mortgage, absolute transfer of the property already takes place. Hence, the question of intervention of the court may not arise. It has a condition of retransfer. it is submitted that by no means it can be said that the transactions in question are like those as English mortgage. On the basis of the above provision it is further submitted that if the condition of retransfer is not invoked the mortgagee is possessed of all rights absolutely in the property. There are different kinds of mortgages as enumerated in section 58 of the Transfer of Property Act. We feel that it would not be necessary to further go into the matter as to whether the agreements in the cases before us amount to English mortgage or not since the non obstante clause under section 13(1) of the Act provides that notwithstanding anything contained in section 69 a secured interest can be enforced without intervention of the court. That is to say it overrides the provision as contained under section 69 where it is said that in no cases, other than those as enumerated in clauses (a), (b) and (c), a mortgage shall be enforced without intervention of the court. Once the said condition, as noted above, in section 69 of the Transfer of Property Act, the general law on the subject, has been overridden by the special enactment namely the Securitisation Act, it would not make much of a difference as to whether the transactions in

question are akin to or amount to English mortgage or not, since irrespective of the kind of the mortgage the secured interest is liable to be enforced without intervention of the court as per the provision contained under section 13 of the Act.

SAFE GAURDS FOR BORROWERS UNDER SECURITIZATION ACT:-

Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India II (2004) BC 397 (SC) : 110 (2004) DLT 665 (SC) : 2004(5) All MR (SC) 484, 2003 (6) SCALE 7

Nonetheless dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved.

The purpose of serving a notice upon the borrower under sub-section (2) of section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of section 13 in case of non-compliance of notice within 60 days.

The creditor must apply its mind to the objections raised in reply to such notice and an internal

mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of section 13 of the Act.

Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor.

It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under section 17 of the Act matures on any measure having been taken under sub-section (4) of section 13 of the Act.

It will also cater the cause of transparency and not secrecy and shall be conducive in building an

atmosphere of confidence and healthy commercial practice. Such a duty, in the circumstances of the case and the provisions is inherent under section 13(2) of the Act.

The next safeguard available to a secured borrower within the framework of the Act is to approach the Debt Recovery Tribunal under section 17 of the Act. Such a right accrues only after measures are taken under sub-section (1) of section 13 of the Act.

Under the Securitisation rules it is provided that before putting the property on sale the authorized officer has to obtain the valuation of immovable property, a reserved price is to be fixed and a notice of 30 days before sale is to be served on the borrower.

Therefore, during this period which would be in all more than 60 days it would be open for a borrower to approach the Debt Recovery Tribunal and file a petition for any appropriate relief and if a case is so made out, he can even get a relief of stay, in exercise of ancillary power which vest in the Tribunal as per decisions referred and *ITO v. Mohd Kunhi* (1969) 2 SCR 65 and, *Allahabad Bank v. Radha Krishna Maity* (1999) 6 SCC 755. Again referring to section 19 of the Act it is pointed out that in case in the end the Tribunal finds that the secured assets have been wrongfully transferred or taken possession of an order for return of such assets can be passed and the

borrower in that even shall also be entitled for compensation.

THE DEBTS RECOVERY TRIBUNAL CANNOT PASS A DECREE. IT CAN ISSUE ONLY RECOVERY CERTIFICATES

Court in Nahar Industrial Enterprises Limited v. Hong Kong and Shanghai Banking Corporation, (2009) 8 SCC 646. The Court examined the provisions of RDDBFI Act in detail to decide as to whether the Tribunal is a Civil Court, with power to give a decision with authoritativeness. The Supreme Court said: "85. If the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the bank or financial institution to approach it first. The continuance of its counterclaim is entirely dependent on the continuance of the applications filed by the bank. Before it no declaratory relief can be sought for by the debtor. It is true that claim for damages would be maintainable but the same have been provided by way of extending the right of counterclaim. 86. The Debts Recovery Tribunal cannot pass a decree. It can issue only recovery certificates. [See Sections 19(2) and 19(22) of the Act.] The power of the Tribunal to grant interim order is attenuated with circumspection. [See Dataware Design Labs (P) Ltd. v. SBI, Comp Cas. at p. 184.] Concededly in the proceeding before the Debts Recovery Tribunal

detailed examination, cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception. Entire focus of the proceedings before the Debts Recovery Tribunal centres round the legally recoverable dues of the bank. 89. The Tribunal could have been treated to be a civil court provided it could pass a decree and it had all the attributes of a civil court including undertaking of a fullfledged trial in terms of the provisions of the Code of Civil Procedure and/or the Evidence Act. It is now trite law that jurisdiction of a court must be determined having regard to the purpose and object of the Act. If Parliament, keeping in view the purpose and object thereof thought it fit to create separate Tribunal so as to enable the banks and the financial institutions to recover the debts expeditiously wherefor the provisions contained in the Code of Civil Procedure as also the Evidence Act need not necessarily be resorted to, in our opinion, by taking recourse to the doctrine of purposive construction, another jurisdiction cannot be conferred upon it so as to enable this Court to transfer the case from the civil court to a tribunal.

In Allahabad Bank v. Canara Bank and Ors.: AIR 2000 SC 1535, "In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The

RDB Act requires the Tribunal alone to decide applications for recovery of debts due to Banks or financial institutions. Once the Tribunal passes an order that the debt is due, the Tribunal has to issue a certificate under Section 19(22) [formerly under Section 19(7)] to the Recovery Officer for recovery of the debt specified in the certificate. The question arises as to the meaning of the word 'recovery' in Section 17 of the Act. It appears to us that basically the Tribunal is to adjudicate the liability of the defendant and then it has to issue a certificate under Section 19(22). Under Section 18, the jurisdiction of any other Court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal (this exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Article 226 or 227 of the Constitution). This is the effect of Sections 17 and 18 of the Act". It was further observed, "Even in regard to 'execution', the jurisdiction of the Recovery Officer is exclusive. Now a procedure has been laid down in the Act for recovery of the debt as per the certificate issued by the Tribunal and this procedure is contained in chapter V of the Act and is covered by Sections 25 to 30. It is not the intendment of the Act that while the basic liability of the defendant is to be decided by the Tribunal under Section 17, the Banks Financial Institutions should go to the Civil Court or the Company Court or some

other authority outside the Act for the actual realisation of the amount. The certificates granted under Section 19(22) has, in our opinion, to be executed only by the Recovery Officer" thereby meaning that the Recovery Officer is entitled to execute the decree passed by the Tribunal and there cannot be a dual jurisdiction at different stages as it is not contemplated under the Act.

WHETHER LIMITATION ACT IS APPLICABLE TO A PROCEEDING BEFORE DEBT RECOVERY TRIBUNAL

The Supreme Court in Transcore v. Union of India and another (2008) 1 SCC 125 observed that the Debts Recovery Tribunal is a tribunal, it is the creature of the statute but it has no inherent power which exists in the civil courts. The Supreme Court in Sakuru v. Tanaji, (AIR 1985 SC 1279 = (1985) 3 SCC 590), by following the earlier decisions held that the provisions of the Limitation Act would apply only to proceedings in "Court"; and not to appeals or applications before bodies other than Courts. The Supreme Court said : "3.It is well settled by the decisions of this Court in town Municipal Council v. Presiding Officer, Labour Court, Hubli (1970) 1 SCR 51 = (AIR 1969 SC 1335), Nityananda M. Joshi v. Life Insurance Corporation of

India (1970) 1 SCR 36 = (AIR 1970 SC 209) and Sushila Devi v. Ramanandan Prasad (1976) 2 SCR 945 = (AIR 1976 SC 177) that the provisions of the Limitation Act, 1963 apply only to proceedings in courts and not to appeals or applications before bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. The Collector before whom the appeal was preferred by the appellant herein under Section 90 of the Act not being a court, the Limitation Act, as such, had no applicability to the proceedings before him. But even in such a situation the relevant special statute may contain an express provision conferring on the Appellate Authority, such as the Collector, the power to extend the prescribed period of limitation on sufficient cause being shown by laying down that the provisions of Section 5 of the Limitation Act shall be applicable to such proceedings."

PROCEDURE OF RECOVERY AFTER 2004 AMENDMENT

Supreme Court in Transcore v. Union of India and another, (2008) 1 SCC 125, wherein the Supreme Court has held as follows: "24. Section 13(3) inter alia states that the notice under Section 13(2) shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank/FI. In the event of non-payment

of secured debts by the borrower, notice under Section 13(2) is given as a notice of demand. It is very similar to notice of demand under Section 156 of the Income Tax Act, 1961. After classification of an account as NPA, a last opportunity is given to the borrower of sixty days to repay the debt. Section 13(3-A) inserted by amending Act 30 of 2004 after the judgment of this Court in *Mardia Chemicals* (supra), whereby the borrower is permitted to make representation/objection to the secured creditor against classification of his account as NPA. He can also object to the amount due if so advised. Under Section 13(3-A), if the bank/FI comes to the conclusion that such objection is not acceptable, it shall communicate within one week the reasons for non-acceptance of the representation/objection. A proviso is added to Section 13(3-A) which states that the reasons so communicated shall not confer any right upon the borrower to file an application to the DRT under Section 17. The scheme of sub-sections (2), (3) and (3-A) of Section 13 of NPA Act shows that the notice under Section 13(2) is not merely a show cause notice, it is a notice of demand. That notice of demand is based on the footing that the debtor is under a liability and that his account in respect of such liability has become sub-standard, doubtful or loss. The identification of debt and the classification of the account as NPA is done in accordance with the guidelines issued by RBI. Such notice of demand, therefore, constitutes an action taken under the

provisions of NPA Act and such notice of demand cannot be compared to a show cause notice. In fact, because it is a notice of demand which constitutes an action, Section 13(3-A) provides for an opportunity to the borrower to make representation to the secured creditor. Section 13(2) is a condition precedent to the invocation of Section 13(4) of NPA Act by the bank/FI. Once the two conditions under Section 13(2) are fulfilled, the next step which the bank or FI is entitled to take is either to take possession of the secured assets of the borrower or to take over management of the business of the borrower or to appoint any manager to manage the secured assets or require any person, who has acquired any of the secured assets from the borrower, to pay the secured creditor towards liquidation of the secured debt..... Reading the scheme of Section 13(2) with Section 13(4), it is clear that the notice under Section 13(2) is not a mere show-cause notice and it constitutes an action taken by the bank/FI for the purposes of the NPA Act."

Kanaiyalal Lalchand Sachdev v. State of Maharashtra, (2011) 2 SCC 782, the Supreme Court once again indicated the scope of Section 13(3-A) of the SARFAESI Act in the following words :- "16. Section 13(3-A) of the Act was inserted by Act 30 of 2004 after the decision of this Court in *Mardia Chemicals* and provides for a last opportunity for the borrower to make a representation to the secured creditor against the classification of his account as a

non-performing asset. The secured creditor is required to consider the representation of the borrowers, and if the secured creditor comes to the conclusion that the representation is not tenable or acceptable, then he must communicate, within one week of the receipt of the communication by the borrower, the reasons for rejecting the same."

IF THE BORROWER DOES NOT RECEIVE ANY COMMUNICATION FROM THE SECURED CREDITOR CONVEYING THE REASONS FOR NON-ACCEPTANCE OF THE OBJECTION, HE IS ENTITLED TO PRESUME THAT THE SECURED CREDITOR HAS FOUND THE REPRESENTATION ACCEPTABLE

Division Bench of the Karnataka High Court in Mrs.Sunanda Kumari v. Standard Chartered Bank represented by its Authorised Officer, 2006 (4)

KCCR 2216, wherein the Division Bench observed as follows: "It is not disputed that even though the petitioners had submitted Annexure 'C' reply to Annexure 'B' notice issued under sub-section (2) of Section 13, the respondent bank had not sent any communication to the petitioners as required under sub-section (3A) of Section 13. Annexure 'D' application was filed before the Chief Metropolitan Magistrate only on 27.1.2005 i.e., after sub-section (3A) was inserted in Section 13. Sub-section (3A) casts a duty on the secured creditor to consider the representation made or objection raised by the borrower and if the secured creditor comes to the

conclusion that such representation or objection is not acceptable or tenable, he is bound to communicate to the borrower the reasons for non-acceptance within one week of receipt of the representation or objection. Thus, sub-section (3A) confers on the borrower a right to know the reasons for the non-acceptance of his representation or objection by the secured creditor. Hence the secured creditor is statutorily bound to consider the borrower's representation or objection and if the representation or objection is not tenable or acceptable, he is bound to communicate the reasons for such non-acceptance. If the borrower does not receive any communication from the secured creditor conveying the reasons for non-acceptance of the objection, he is entitled to presume that the secured creditor has found the representation acceptable and the objection tenable. Since the respondent-bank failed to discharge its statutory obligations under sub-section (3A) of Section 13 of the Act, the action initiated by the respondent under sub-section (4) of Section 13 and Section 14 is illegal and irregular...."

Mardia Chemicals Ltd. and Ors. vs. Union of India (UOI) and Ors. (08.04.2004 - SC) : MANU/SC/0323/2004 - The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted

by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of

Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non- acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub- section (4) of Section 13 of the Act.

**THE CHIEF METROPOLITAN MAGISTRATE OR
THE DISTRICT MAGISTRATE, AS THE CASE MAY
BE, IS OBLIGED TO TAKE POSSESSION OF SUCH**

**ASSET OR DOCUMENT AND FORWARD THE SAME
TO THE SECURED CREDITOR**

United Bank of India v. Satyawati Tondon & Ors. (2010) 8 SCC 110 and in **Kanaiyalal Lalchand Sachdev & Ors. v. State of Maharashtra & Ors. (2011) 2 SCC 782**. the functions performed by the DMs and CMMs under Section 14 of the SARFAESI Act are ministerial in nature. No hearing is supposed to be given to the borrowers. It is not even necessary to issue notices to them. Counsel submitted that in the teeth of the law laid down by the Supreme Court, the intervention applications of persons who with oblique motive try to obstruct the banks' efforts to take possession of the secured assets are granted, the borrowers and intervenors are unnecessarily asked to submit large number of documents and the DMs and the CMMs enter into adjudication of various issues which they cannot, in law, do. The entire exercise is given trappings of a civil suit.

Kanaiyalal Lalchand Sachdev & Ors. v. State of Maharashtra & Ors. (2011) 2 SCC 782. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an

action under Section 13(4) of the Act, by providing for an appeal before the DRT.

In Indian Banks' Association v. Devkala Consultancy Service [2004] 120 Comp Cas 612 (SC) : AIR 2004 SCW 2491, the apex court is concerned with higher amount of interest for no fault of the party concerned.

Madras High Court in the case of Sree Lakshmi Products v. State Bank of India reported in AIR 2007 Mad 148 (para 9): On a plain reading of the observations made in Transcore case it is clear that the bank/FI is entitled to take actual possession of the secured assets from the borrower or from any other person in terms of Section 13(4) of the SARFAESI Act. Any transfer of secured assets after taking possession of the same by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured assets. Any party aggrieved by such dispossession will have to take recourse to approaching the DRT under Section 17(4) of the SARFAESI Act. If the party is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. By virtue of Section 17(4) read with Section 35 of the SARFAESI Act, if, in a given case the measures undertaken by the secured creditor under Section 13(4) come in conflict with the provisions of any State law, then notwithstanding

such conflict, the provisions of Section 13(4) shall override the local law. Section 13(13) of the SARFAESI Act operates as an attachment/injunction restraining the borrower from disposing of the secured assets and, therefore, any tenancy created after such notice would be null and void. Any tenancy created by the mortgager after the mortgage in contravention of Section 65-A would not be binding on the bank/FI, and in any event such tenancy rights shall stand determined once action under Section 13(4) has been taken by the bank/FI. When the petitioner is claiming a tenancy prior to the creation of mortgage and such tenancy is disputed by the bank the remedy of the petitioner is to approach DRT by way, of an application under Section 17 of the SARFAESI Act to establish its rights.

In Indian Bank v. ABS Marine, (2006) 5 SCC 72 the Hon'ble Supreme Court while deciding the question as to whether the borrower's suit for damages against the bank for non-release of the sanctioned loan was required to be transferred to Tribunal upon the application filed by the bank or whether such borrower's suit was an independent suit and whether the borrower could be compelled to make his claim against the bank not by way of suit, but only by way of counter-claim, the Hon'ble Supreme Court held that making a counter-claim in bank's application before Tribunal is not the only remedy but an option available to the defendant-borrower. He can

also file a separate suit or proceeding before Civil Court or other appropriate forum in respect of his claim against the bank and pursue the same. The Hon'ble Supreme Court observed that it is evident from Sections 17 & 18 of the Debt Recovery Act that Civil Courts' jurisdiction is barred only in regard to applications by a bank or a financial institution for recovery of its debts. The jurisdiction of Civil Court is not barred in regard to any suit filed by a borrower or any other person against a bank for any relief.

Supreme Court in the case of TRANSCORE vs. Union of India & Anr., 2008 (1) SCC 125.

The Supreme Court while dealing with Section 14 and 17 of the SARFAESI Act held as follows:- "74.Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid,

and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous."

On analyzing the judgment of the Supreme Court in Transcore case, supra, a Division Bench of the Bombay High Court in Trade Well v. Indian Bank, 2007 Cri LJ 2544 has given a gist of the said judgment of the Supreme Court as follows:

- (a) The DRT Act did not provide for assignment of debts to securitisation companies. The secured assets could not be liquidated in time. The NPA Act was enacted to reduce mounting non-performing assets by empowering banks to liquidate the assets and secured interest.
- (b) The NPA Act deals with crystallized liabilities.
- (c) The NPA Act proceeds on the basis that the asset is created in favour of bank which could be assigned

to the assets management company which steps into the shoes of the secured creditors.

(d) Section 13(2) proceeds on the basis that the borrower is under a liability and his account in the books of account of the bank is classified as sub-standard or doubtful or loss. The NPA Act comes into force only if these two conditions are satisfied.

(e) Since Section 13(2) deals with liquidation of liability on the basis that the account of the borrower has become non-performing, there is no scope of any dispute regarding liability.

(f) The NPA Act does not deal with disputes between the secured creditors and the borrowers but it deals with the rights of the secured creditors inter se.

(g) Section 13(1) and Section 13(2) of the NPA Act proceed on the basis that the security interest in the bank and financial institution needs to be enforced expeditiously without the intervention of the Court and that enforcement could take place by non-adjudicatory process. The NPA Act provides for recovery of possession by non-adjudicatory process.

(h) The NPA Act removes all fetters on the right of the secured creditor.

(i) Under Section 17(2), the DRT is required to consider whether any of the measures referred to in Section 13(4) are in accordance with the provisions of the NPA Act and the Rules made thereunder.

(j) If while examining the application under Section 17, the DRT comes to the conclusion that any of the measures taken under Section 13(4) are not in

accordance with NPA Act, it shall direct the secured creditor to restore the possession to the borrower or restore management to the borrower.

(k) If the DRT declares that the recourse taken under Section 13(4) is in accordance with the provisions of the NPA Act then notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to anyone or more of the measures as specified under Section 13(4) to recover his secured debt.

(l) Section 17(4) shows that the secured creditor is free to take recourse to any one of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force, e.g. for the sake of argument if in a given case, the measures undertaken by the secured creditor under Section 13(4) come in conflict with the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) shall override the local law.

(m) This position stands clarified by Section 35 of the NPA Act which states that the provisions of the NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 gives an overriding effect to the NPA Act over all other laws, if they are in consistent with it.

(n) The dichotomy between symbolic and physical possession does not find place in the NPA Act.

(o) Rule 8 of the said Rules deals with the sale of immovable secured assets. Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery

of possession under Rule 9. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL, Rule 1 of the CPC. The court receiver can take symbolic possession and in appropriate cases, he can take actual possession even prior to the decree. The authorised officer's powers are greater as security interest is already created in the bank. Hence, under Rule 8, he can take steps to preserve the secured asset till issuance of the sale certificate under Rule 9. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. This scheme of the NPA Act therefore does not disclose any dichotomy between symbolic possession and physical possession.

(p) Since scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed not in accordance with the provisions of the NPA Act, the DRT is entitled to restore status quo ante, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession.

(q) The disputes which are sought to be avoided by Rule 8 read with Rule 9 of the said Rules are those

where third party interests are created overnight and in very many cases those third parties take up the defence of being a bonafide purchaser for value without notice."

In the case of Standard Chartered Bank v. V. Noble Kumar & Ors., (2013) 9 SCC 620 the Supreme Court noted the procedure to be followed by the CMM while dealing with a petition under Section 14 of the Act. The Court stated as follows: "24. Under the scheme of Section 14, a secured creditor who desires to seek the assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, secured asset is located praying that the secured asset and other documents relating thereto may be taken possession thereof. The language of Section 14 originally enacted purportedly obliged the Magistrate receiving a request under Section 14 to take possession of the secured asset and documents, if any, related thereto in terms of the request received by him without any further scrutiny of the matter."

MAGISTRATE TO ANALYZE FOLLOWING ASPECTS BEFORE EXERCISING POWERS UNDER SECTION 14.

HIGH COURT OF JUDICATURE AT MADRAS -
K.R.Chandrasekaran vs Union Of India on 17 April,
2012 - HON'BLE MR.JUSTICE P.JYOTHIMANI &

HON'BLE MR.JUSTICE M.DURAI SWAMY -

W.P.Nos.950 of 2012 - Even though it is true that it is only after exercise of its power under Section 13(4) of the SARFAESI Act by giving notice of possession by the bank or financial institution, such secured creditor can proceed under Section 14 of the SARFAESI Act only in cases where it is necessary to obtain such assistance from the Chief Metropolitan Magistrate or District Magistrate, in our view, before exercising such power under Section 14 of the SARFAESI Act, which obviously does not require any notice to anyone, the authority must cogitate on and analyze the following aspects:

(i)that even after giving notice under Section 13(4) of the SARFAESI Act, the secured creditor requires assistance from the Chief Metropolitan Magistrate or District Magistrate under Section 14 of the SARFAESI Act;

(ii)that while classifying the due as non performing asset, the bank or financial institution has followed the procedure contemplated under the SARFAESI Act;

(iii)that notice under Section 13(2) of the SARFAESI Act was, in fact, given to the borrower in accordance with the Rules, including paper publication, affixture, etc., by giving him sixty days time as contemplated therein and such notice has been received by the borrower and it contains the details of the amount payable by the borrower, etc.;

(iv)that in case any representation has been made by the borrower under Section 13(3-A) of the SARFAESI

Act, the secured creditor bank or financial institution has replied within one week;

(v)that notice of possession under Section 13(4) of the SARFAESI Act has been given; and

(vi)that in cases where the borrower or guarantor is not in possession of the secured asset, whether the bank or financial institution has scrupulously followed Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 in affixing the possession notice and if necessary, direct the bank or financial institution to inform about the affixture of possession notice under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 to the tenant in occupation and also in that event direct the bank or financial institution to give such tenant sufficient time to file appeal under Section 17 of the SARFAESI Act to the Debts Recovery Tribunal, and thereafter the Chief Metropolitan Magistrate or District Magistrate should pass appropriate orders and such order shall contain laconically the above said considerations to evince that there has been an application of mind by the authority. This is necessary as the Supreme Court has held that even against the possession notice under Section 13(4) and order under Section 14 of the SARFAESI Act, a person aggrieved can approach the Debts Recovery Tribunal under Section 17 of the SARFAESI Act. A consideration of the above said aspects will be helpful to prevent a bona fide tenant, who has been in occupation for a long time, from being

thrown out arbitrarily without his knowledge due to the default committed by the borrower, who happens to be a landlord. It behooves us to lay down the above said exhaustive guidelines as an extraordinary power has been conferred on the Chief Metropolitan Magistrate or District Magistrate under Section 14 of the SARFAESI Act, of course in order to achieve the main goal of the SARFAESI Act itself, as stated above.

The Chief Metropolitan Magistrate or District Magistrate shall follow the following guidelines:

HIGH COURT OF JUDICATURE AT MADRAS -
K.R.Chandrasekaran vs Union Of India on 17 April,
2012 - HON'BLE MR.JUSTICE P.JYOTHIMANI &
HON'BLE MR.JUSTICE M.DURAI SWAMY -
W.P.Nos.950 of 2012 -

(i)that even after giving notice under Section 13(4) of the SARFAESI Act, the secured creditor requires assistance from the Chief Metropolitan Magistrate or District Magistrate under Section 14 of the SARFAESI Act;

(ii)that while classifying the due as non performing asset, the bank or financial institution has followed the procedure contemplated under the SARFAESI Act;

(iii)that a notice under Section 13(2) of the SARFAESI Act was, in fact, given to the borrower in accordance with the Rules, including paper publication, affixture, etc., by giving him sixty days time as contemplated therein and such notice has been received by the

borrower and it contains the details of the amount payable by the borrower, etc.;

(iv)that in case any representation has been made by the borrower under Section 13(3-A) of the SARFAESI Act, the secured creditor bank or financial institution has replied within one week;

(v)that a notice of possession under Section 13(4) of the SARFAESI Act has been given;

(vi)that in cases where the borrower or guarantor is not in possession of the secured asset, whether the bank or financial institution has scrupulously followed Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 in affixing the possession notice and if necessary, direct the bank or financial institution to inform about the affixture of possession notice under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 to the tenant in occupation and also in that event direct the bank or financial institution to give such tenant sufficient time to file appeal under Section 17 of the SARFAESI Act to the Debts Recovery Tribunal; and

(vii)thereafter pass appropriate orders, which shall contain laconically the above said considerations to evince that there has been an application of mind by the authority.

DRT COURT JURISDICTION

Authorised Officer, Indian Overseas Bank And Anr.-vs.-M/s. Ashok Saw Mill, AIR 2009 SC 2420.

The Apex Court held that the legislature by including

Sec. 17(3) in the SARFAESI Act has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. It cannot be said that the DRT has no jurisdiction to deal with a post-Section 13(4) situation.

Jagdish Singh-vs.-Heeralal and Ors., AIR 2014 SC 371. The Apex Court held that if any person is aggrieved by any action taken by the secured creditor under Sec. 13(4) of SARFAESI, the remedy open to him is to approach the DRT. The Civil Court's jurisdiction is barred by Sec. 34 of the SARFAESI.

M/s. Vision Comptech Integrators Ltd.-vs.-State Bank of India & Ors., AIR 2014 Cal 161. A learned Judge of this Court held that in a case where the aggrieved person claims to be a bona fide lessee or a tenant from whom possession is yet to be taken over but a sale notice has been issued in respect of the property in question, even without losing possession of the operation of the secured asset under lease or tenancy, the lessee or the tenant, being a non-borrower, would have the right to approach the DRT as soon as the sale notice is issued in terms of the Rule 8 (6) of the DRT Rules.

In Punjab National Bank-vs.-OC Krishnan, AIR 2001 SC 3208, the Apex Court held that the DRT Act has been enacted with a view to provide a special

procedure for recovery of debts due to Banks and the financial institutions. There is hierarchy of appeal provided in the Act and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Arts. 226 and 227 of the Constitution or by filing a civil suit which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Arts. 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the court refrains from exercising its writ jurisdiction.

In "Allahabad Bank v. Canara Bank", reported in MANU/SC/0262/2000 : (2000) 4 SCC 406, the appellant-Bank had obtained a money decree against the debtor-company from the Debt Recovery Tribunal under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and thereafter filed a recovery case before the Recovery Officer. However, on a winding-up petition filed by a third party, the learned Company Judge passed an order under Section 442 and section 537 of the Companies Act staying sale of the debtor-company's assets. The Hon'ble Supreme Court held that the provisions of Section 17 and 18 of the RBD Act are exclusive so far the question of adjudication of the liability of the defendant to the appellant-Bank is concerned. Even in regard to "execution" the jurisdiction of the Recovery Officer is exclusive. The

Hon'ble Supreme Court has observed as under : 23. "..... Now a procedure has been laid down in the Act for recovery of the debt as per the certificate issued by the Tribunal and this procedure is contained ' in Chapter V of the Act and is covered by Sections 25 to 30. It is not the intendment of the Act that while the basic liability of the defendant is to be decided by the Tribunal under Section 17, the banks/financial institutions should go to the civil court or the Company Court or some other authority outside the Act for the actual realisation of the amount. The certificate granted under Section 19(22) has, in our opinion, to be executed only by the Recovery Officer. No dual jurisdictions at different stages are contemplated. Further, Section 34 of the Act gives overriding effect to the provisions of the RDB Act..... The provisions of Section 34(1) clearly state that the RDB Act overrides other laws to the extent of "inconsistency". In our opinion, the prescription of an exclusive Tribunal both for adjudication and execution is a procedure clearly inconsistent with realisation of these debts in any other manner."

REMEDIES AVAILABLE UNDER SARFAESIA

United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110, Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by

the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1). Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which

an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the Appellate Tribunal. Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

PROCEDURE REGARDING SALE OF IMMOVABLE PROPERTY

General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs. Ikbal and others, 2013 (10) SCC 83. - 2002 Rules have been framed by

the Central Government in exercise of the powers conferred on it by sub-section (1) and clause (b) of sub-section (2) of Section 38 read with sub-sections (4), (10) and (12) of Section 13 of the SARFAESI Act.Rule 9* provides for the detailed procedure with regard to sale of immovable property including issuance of sale certificate and delivery of possession. Sub-rule (1) of Rule 9 states that no sale of immovable property shall take place before the expiry of 30 days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower. Sub-rule (2) provides that sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid. This is subject to confirmation by the secured creditor. There is a proviso appended to sub-rule (2) which provides that no sale under this rule shall be confirmed if the amount offered by sale price is less than the reserve price but this is relaxable in view of the second proviso appended to sub-rule (2). Sub-rule (3) lays down that on every sale of immovable property, the purchaser shall immediately make the deposit of 25% of the amount of the sale price. In default of such deposit, the property shall forthwith be sold again. Sub-rule (4) provides that the balance amount of purchase price payable shall be paid by the purchaser on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties. Sub-

rule (5) makes a provision that if the balance amount of purchase price is not paid as required under sub-rule (4), then the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold. According to sub-rule (6), on confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to the 2002 Rules. A reading of sub-rule (1) of Rule 9 makes it manifest that the provision is mandatory. The plain language of Rule 9(1) suggests this. Similarly, Rule 9(3) which provides that the purchaser shall pay a deposit of 25% of the amount of the sale price on the sale of immovable property also indicates that the said provision is mandatory in nature. As regards balance amount of purchase price, sub-rule (4) provides that the said amount shall be paid by the purchaser on or before the fifteenth day of confirmation of sale of immovable property or such extended period as may be agreed upon in writing between the parties. The period of fifteen days in Rule 9(4) is not that sacrosanct and it is extendable if there is a written agreement between the parties for such extension. What is the meaning of the expression 'written agreement between the parties' in Rule 9(4)? 2002 Rules do not prescribe any particular form for such agreement except that it must

be in writing. The use of term 'written agreement' means a mutual understanding or an arrangement about relative rights and duties by the parties. For the purposes of Rule 9(4), the expression "written agreement" means nothing more than a manifestation of mutual assent in writing. The word 'parties' for the purposes of Rule 9(4) we think must mean the secured creditor, borrower and auction purchaser.

THERE IS NO INHERENT RIGHT GIVEN TO A LITIGANT FOR CROSS-EXAMINATION

Supreme Court judgment in the case of Union of India and Anr. v. Delhi High Court Bar Association and Ors., (2002) 4 Supreme Court Cases 275, there is no inherent right given to a litigant for cross-examination and that a strong case has to be made by a party to come up with such a request. However, in the very same judgment, in terms it has been stated by the Supreme Court that the Tribunal has a discretion to examine any witness on oath and permit a party to cross-examine a witness. The Supreme Court has only reaffirmed what proviso to Rule 12(6), Debts Recovery Tribunal (Procedure) Rules, 1993 lays down. Proviso to Rule 12(6) of the Debts Recovery Tribunal (Procedure) Rules, 1993 in substance states that whenever any party desires production of witness for cross-examination then his evidence could not be taken by way of an affidavit but it would be mandatory for the Tribunal to require the production of the

witness. if the Tribunal desires that a particular point is required to be clarified then for that limited purpose, the party should be allowed to cross examine the witness to remove ambiguity which has cropped up in the pleadings.

DRT COURT AND APPLICABILITY OF CIVIL PROCEDURE CODE

Section 22 of the Recovery of Debts Due to Bank and Financial Institution Act, 1993 says that the Tribunal and the appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of the Act and of any rules, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure including the place at which they shall have their sittings. In Sub-section (2) of that section the Debts Recovery Tribunal has been given the same powers as are vested in Civil Court under Code of Civil Procedure, 1908, while trying a suit, in respect of following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses of documents;

- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding it ex parte\
- (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
- (h) any other matter which may be prescribed.

In this context, a reference may be made to the case of **A A. Haja Muniuddin v. Indian Railways reported in (1992) 4 SCC 736 : (AIR 1993 SC 361)** where Supreme Court has held on construction of Section 18(1) of the Railway Claims Tribunal Act, 1987 that the Claims Tribunal shall not be bound by the procedure of the Civil Procedure Code but does not go so far as to say that it 'shall be precluded' from invoking the provision of the Code even if the same is not inconsistent with the Act and the rules. A view which advances the cause of justice must be preferred to the one which defeats it. Section 18(1) only says that the Claims Tribunal 'shall not be bound' by the procedure laid down by the Code but does not go so far as to say that it 'shall be precluded' from invoking the provisions laid down by the Code even if the same is not inconsistent with the Act and the Rules. Since the Claims Tribunal is empowered to regulate its own procedure, there is nothing in the Act and the Rules which precludes the invocation of Order XXXIII of the Code. A view which advances the cause of justice must be preferred to the one which defeats

it. We are, therefore, of the opinion that the Tribunal adopted a narrow interpretation of the relevant provisions of the Act in coming to the conclusion that the Act as well as the Rules did not permit invocation of Order XXXIII of the Code. The view taken by the Tribunal results in a person not having the means to pay the fee prescribed for preferring a claim being left without a remedy. Such a view would result in gross injustice. The Tribunal has the power to lay down its own procedure and as stated earlier Section 18(1) does not preclude it from invoking the provisions of Order XXXIII of the Code if the ends of justice so require. When an indigent person approaches the Tribunal for compensation for the wrong done to him, the Tribunal cannot refuse to exercise jurisdiction merely because he does not have the means to pay the fee. In such a situation we think the ends of justice require that the Tribunal should follow the procedure laid down in Order XXXIII of the Code to do justice for which it came to be established.

Industrial Credit and Investment Corporation of India Limited v. Grapco Industries Limited, AIR 1999 SC 1975, wherein it is observed by the Supreme Court that, "the Tribunals established under the recovery of Debts Due to Banks and Financial Institutions Act, 1993, can exercise power of Civil Court as contained in Civil Procedure Code..... rather it can travel beyond the Civil Procedure Code and the

only fetter put on its powers is to observe principles of natural justice."

Smt. Periyakkal and Ors. v. Smt. Dakshyani, reported in AIR 1983 Supreme Court 428, wherein it was laid down by the Supreme Court that time fixed by the consent decree also can be extended by the Court and the Courts has such power. "wherein an appeal arising out of an application under Order 21 Rule 90, the parties entered into a compromise and invited the Court to make an order in terms of the compromise, which the Court did, the time for deposit stipulated by the parties became the time allowed by the Court and this gives the Court the jurisdiction to extend time in appropriate cases." The Supreme Court further observed that "time would not be extended ordinarily, nor for the mere asking. It would be granted in rare case to prevent manifest injustice."

SBI Commercial and International Bank v. Badridas Gauridatt Pvt. Ltd., 2002(2) Mh. L.J. 749, wherein the learned Single Judge of the Bombay High Court took a view that, "the Court can exercise jurisdiction under Section 148 of the Code of Civil Procedure to extend time if it is in the interest of justice." "consent terms filed by the parties had merged in the order of the Court as such and the Court can very well extend the time in making payment of the instalments and there is no necessity of taking consent from the decree holder"....."the

consent terms having been filed, they become order of the Court and the Court is in-charge of the matter and not the decree holder."

Apex Court in the case of Mahanth Ram Das v. Ganga Das, AIR 1961 S.C. 882 has ruled that Section 148 of the Code of Civil Procedure empowers the Court to deal with events that might arise subsequent to an order for the purpose of enlarging the time for payment even though it had been peremptorily fixed. It is further observed that such procedural orders, though peremptory, are in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay and that they do not, however, completely estop a Court from taking note of events and circumstances, which happen within the time fixed.

Balraj Taneja v. Sunil Madan, (1999) 8 Supreme Court Cases 396, wherein it has been held as follows: "Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or is a case in which the written statement is not filed and the case is decided under Order 8, Rule 10, the Court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved."

APPLICABILITY OF SARFAESI ACT

Indiabulls Housing Finance Limited vs. Deccan Chronicle Holdings Limited and Ors.
MANU/SC/0163/2018 - 2018 (14) SCC 783 -In the

instant case, loan was given by IBFSL which was not a financial institution covered by the SARFAESI Act when the loan was given. However, this entity got merged with the Appellant and Appellant was a SARFAESI company. The loan/debts/financial assets stood vested in the Appellant pursuant to the amalgamation scheme filed by the two companies where under the predecessor company, IBFSL got amalgamated with the Appellant. Thus, on sanction of the scheme of amalgamation, all loans, recoveries, security, interest, financial documents, etc. in favor of IBFSL got transferred to and stood vested in the Appellant including the loans given by IBFSL to Respondent borrowers, debts recoverable by IBFSL from Respondent borrowers in favor of IBFSL, security documents executed by Respondent borrowers in favor of IBFSL, etc. On the sanctioning of the scheme, the Respondent borrowers became the borrower of the Appellant as if the financial assistance was granted by the Appellant to the Respondent borrowers. The present Court was of the opinion that the aforesaid discussion, thus, leads to conclude that Respondent would be treated as 'borrower' within the SARFAESI Act.

CIVIL COURT DOES NOT INTERFERE IN DRT AND SARFAESI MATTERS

UNITED BANK OF INDIA VS SATYAWATI TONDON

- (2010)8 SCC 110 - Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1). Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the

secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the Appellate Tribunal.Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for

the time being in force or any instrument having effect by virtue of any such law.

ONE TIME SETTLEMENT AND ITS BINDING NATURE

In "Indian Bank v. Blue Jaggers Estates Ltd.", reported in MANU/SC/0570/2010 : (2010) 8 SCC 129, while rejecting the contention that the creditor-Bank would be bound by the terms of "one time settlement" and it cannot recover the entire amount specified in the notices issued under Section 13(2) of SARFAESI Act, 2002, the Hon'ble Supreme Court has observed as under : 25. "The Court cannot lose sight of the fact that the bank is a trustee of public funds. It cannot compromise the public interest for benefiting private individuals. Those who take loan and avail financial facilities from the bank are duty-bound to repay the amount strictly in accordance with the terms of the contract. Any lapse, in such matters has to be viewed seriously and the bank is not only entitled but duty-bound to recover the amount by adopting all legally permissible methods. Parliament enacted the Act because it was found that legal mechanism available till then was wholly insufficient for recovery of the outstanding dues of banks and financial institutions. Reference in this connection deserves to be made to the judgments of this Court in Delhi Transport Corpn. v. D.T.C. Mazdoor Congress, Central

Bank of India v. State of Kerala and United Bank of India v. Satyawati Tondon."

Shanti Jaiswal vs. State Bank of India: MANU/JH/1460/2014 - AIR 2015 Jhar 13 - Hon'ble Supreme Court in "Sardar Associates v. Punjab & Sind Bank", reported in MANU/SC/1351/2009 : (2009) 8 SCC 257 and "Central Bank of India v. Ravindra", reported in MANU/SC/0663/2001 : (2002)1 SCC 367, the learned Appellate Tribunal held that the settlement arrived at between the creditor and the debtor in terms of the scheme of the Reserve Bank of India must necessarily held to be in public interest. The Reserve Bank of India guidelines for "one time settlement" has been held to be non-discretionary and non-discriminatory. It has been held by the Hon'ble Supreme Court that no exception can be made in favour of/or against a borrower by the creditor-Bank departing from the guidelines issued by the Reserve Bank of India.

CHAPTER - 15

SICK INDUSTRIES

STATE FINANCIAL CORPORATIONS ACT AND SICK INDUSTRIAL COMPANIES (SPECIAL PROVISIONS) ACT, 1985

The conflict between the State Financial Corporations Act, 1951 and SICA came up for consideration before the Supreme Court in Maharashtra Tubes Limited v. State Industrial & Investment Corporation of Maharashtra Ltd. (1993 (2) SCC 194). In the said decision, the Supreme Court underplayed the object behind Sections 29 and 31 of the State Financial Corporations Act, 1951, and held that the primary objective of 1951 Act was to provide an impetus to industrialisation, by providing financial assistance to industrial concerns and that the power conferred upon Financial Corporations under Sections 29 and 31 was not the underlying object and purpose of the statute. Nevertheless, the Court indicated in paragraph 7 that both 1951 and 1985 Act are special enactments, each having a different objective, with the emphasis in the case of the former being on providing financial assistance and the emphasis in the case of the latter being to revive and rehabilitate the sick industries. On account of the manner in which the objects of both the Acts were construed, the Supreme Court eventually came to the conclusion that where an enquiry under Section 16 or 17 of SICA was pending, or where an appeal was pending under Section 25 of SICA, there should be cessation of the

coercive activities in terms of Section 22(1). In other words, the bar under Section 22(1) of SICA was construed to include even the coercive measures provided under Sections 29 and 31 of the 1951 Act.

CLAIMS AGAINST SICK INDUSTRY

Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as "SICA") Section 22 of SICA. Section 22 of SICA is quoted below :--

"22. Suspension of legal proceedings, contracts, etc.--

(1) Where in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be

proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) Where the management of the sick industrial company is taken over or changed in pursuance of any scheme sanctioned under Section 18, notwithstanding anything contained in the Companies Act, 1956 or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law--

(a) it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

(b) no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

(3) Where an inquiry under Section 16 is pending or any scheme referred to in Section 17 is under preparation or during the period of consideration of any scheme under Section 18 or where any such scheme is sanctioned thereunder, for due implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended to that all or

any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as many be specified by the Board :

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

(4) Any declaration made under Sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or the law or any agreement or any decree or order of a Court, Tribunal, officer or other authority or of any submission, settlement or standing order and accordingly :--

(a) any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any Court, Tribunal, officer or other authority shall remain stayed or be continued subject to such declaration; and

(b) on the declaration ceasing to have effect--

(i) any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

(ii) any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded."

NOTE:- It is clear from Section 22 that if an enquiry is pending under Section 16/17 or any scheme referred to under Section 17 is under preparation inter alia no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any "loans or advance" granted to the industrial company shall lie, except with the consent of the Board or the appellate authority, as the case may be. What is interdicted by Section 22 is suit for recovery of money in respect of any loans or advance granted to an industrial company. Same shall not lie or proceeded with except with the consent of BIFR/appellate authority. Object of SICA is to facilitate rehabilitation and winding up of an industrial undertaking, restructuring/reschedulement of loans and advances, in case of revival etc.

Apex Court in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, Madras, AIR 1992 SC 1439, has laid down that suit to recover

the rent by a landlord against a tenant is not barred under Section 22(1). Suspension of such proceedings is not the intention of the Parliament. Therefore, the Apex Court has held that Section 22(1) does not cover a proceeding instituted by a landlord of a sick industrial company for the eviction of the company premises let out to it.

In Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd., (2000) 5 SCC 515, the Apex Court has observed that the object of Section 22 is to afford the maximum protection of employment optimize the use of financial resources, salvaging the assets of production, realising the amounts due to the banks and to replace the existing time consuming and inadequate machinery by efficient machinery. "5. The Act is shown to have been made, in public interest, with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto. The object of the Act appears to be to afford maximum protection of employment, optimize the use of financial resources, salvaging the assets of production, realising the amounts due to the banks and to replace the existing time-consuming and inadequate

machinery by efficient machinery for expeditious determination by a body of experts to safeguard the economy of the country and protect viably sick units. Chapter III deals with the reference, inquiries and claims. Section 15 provides that when an industrial company becomes a sick industrial company as defined under Section 2(o) of the Act, the Board of Directors of the company, shall, within 60 days from the date of finalisation of the duly audited accounts of the company for the financial year make a reference to the Board for determination of the measures which shall be adopted with respect to the company."

Court in Tata Motors Ltd. v. Pharmaceutical Products of India Ltd. 2008 7 SCC 619 wherein it, in no uncertain terms, held that SICA is a special statute and, thus, overrides other Acts like the Companies Act, 1956, stating: (SCC p. 635, paras 31-33) "31. SICA furthermore was enacted to secure the principles specified in Article 39 of the Constitution of India. It seeks to give effect to the larger public interest. It should be given primacy because of its higher public purpose. section 26 of sica bars the jurisdiction of the civil courts.

Apex Court in Patheja Bros, Forgings & Stamping and Anr. v. ICICI Ltd., and Ors., (2000) 6 SCC 545, has laid down that the words of Section 22 are crystal clear. There is no ambiguity therein. It must, therefore, be held that no suit for the enforcement of

a guarantee in respect of a 'loan' or 'advance' granted to the industrial company concerned will lie or be proceeded with. "5. It was contended by learned Counsel for the appellants that the provisions of Section 22 were clear and that thereunder no suit for the enforcement of any guarantee in respect of any loan or advance granted to the industrial company concerned would lie or could be proceeded with, except with the consent of the Board or the appellate authority under the said Act. The learned Solicitor General, appearing for the first respondent, submitted that the suit contemplated by Section 22 was a suit only against the industrial company and that it was only when the industrial company was itself the guarantor or it was sued by a guarantor on subrogation that the provisions of Section 22 would apply. He also submitted that the provisions of Section 22 had to be read in harmony with other provisions of the said Act and he relied in particular upon Section 17(3), Section 18(1)(e) and Section 22A thereof."

In Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd., (2000) 5 SCC 515, it has been held that the object of the Act is to afford maximum protection of employment optimize the use of financial resources, salvaging the assets of production, realising the amounts due to the banks and to replace the existing time consuming and inadequate machinery by efficient machinery for expeditious

determination by a body of experts of safeguard the economy of the country and protect viably sick units.

Apex Court in Gram Panchayat and Anr. v. Shree Vallabh Glass Works Ltd. and Ors., (1990) 2 SCC 440, AIR 1990 SC 1017, it was held that all proceedings for execution, distress or the like against any of the properties of the company would be automatically suspended and could not be taken without consent of the Board. Gram Panchayat is not entitled to recover property tax and other amounts due from the company by initiating coercive proceedings under Section 129 of Bombay Village Panchayat Act, 1959 without consent of the Board. The claim in this decision was not for labour charges.

In Tata Davy Ltd. v. State of Orissa and Ors., (1997) 6 SCC 669, Apex Court held that arrears of sales tax could not be recovered from the appellant company without first obtaining consent of the said Board in this behalf. Recovery was of the sales tax dues realization by the Govt. It was not for the work done/obtained for running industrial unit. Recovery of sales tax, property tax can be deferred and provision of Section 22 is attracted.

In Kailash Nath Agarwal v. Pradeshia Industrial & Investment Corporation of U.P. Ltd., (2003) 4 SCC 305, the Apex Court has held that the words "suit" and "proceedings" used in Section 22(1) have not been

changed interchangeably in SICA. Having regard to the judicial interpretation of the word "suit", it is not possible to accede to the submission of the appellants that the word "suit" in Section 22(1) of the Act means anything other than some form of curial process. There is the absence of expansive words "or the like" which appear after the expression "proceedings", after the word "suit". The exclusion of such "omnibus expression" after the word "suit" must be given some weight in interpreting the word. The Apex Court has held thus :-- "20. There is an apparent distinction between the expressions "proceeding" and "suit" used in Section 22(1). While it is true that two different words may be used in the same statute to convey the same meaning, that is the exception rather than the rule. The general rule is that when two different words are used by the same statute, prima facie one has to construe these different words as carrying different meanings. In *Kanhaiyalal Vishindas Gidwani*, (2001) 1 SCC 78, this Court found that the words "subscribed" and "signed" had been used in the Representation of the People Act, 1951 interchangeably and, therefore, in that context the Court came to the conclusion that when the legislature used the word "subscribed" it did not intend anything more than "signing". The words "suit" and "proceeding" have not been used interchangeably in SICA. Therefore, the reasons which persuaded this, Court to give, the same meaning to two different words in a statute cannot be applied here."

CHAPTER - 16

ARBITRATION PROCEEDINGS

WHAT IS ARBITRATION AGREEMENT NECESSITY

Section 7 of the Arbitration and Conciliation Act, 1996 which refers to "arbitration agreement" to mean the following:

"7 Arbitration agreement.-(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and

the reference is such as to make that arbitration clause part of the contract."

From the perusal of the definition, it is clear that an arbitration agreement can be in the form of; (1) an arbitration clause in a contract or in the form of a separate agreement; (2) it shall be in writing; (3) an arbitration agreement is in writing if it is contained in a document "signed by the parties". Even it contains the letters, telex, telegrams or other means of telecommunication and other means of communication exchange between the parties.

Supreme Court in the case of **Karnataka Power Transmission Corporation Limited and Ors. v. Deepak Cables (India) Ltd.**, MANU/SC/0290/2014 wherein paras 8 and 9 has stated as under:

"8. Before we advert to the rival submissions advanced at the Bar, we think it appropriate to refer to Section 7 of the Act and what it conveys and, thereafter, refer to few authorities to understand what constitutes an arbitration clause in an agreement entered into between two parties. Section 7 of the Act reads as follows: "7. Arbitration agreement. - (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

3) An arbitration agreement shall be in writing.

4) An arbitration agreement is in writing if it is contained in -

a) a document signed by the parties;

b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or

c) an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

9. From the aforesaid provision, it is graphically clear that unless an arbitration agreement stipulates that the parties agree to submit all or certain disputes which have arisen or which may arise in respect of defined legal relationship, whether contractual or not, there cannot be a reference to an arbitrator. To elaborate, it conveys that there has to be intention, expressing the consensual acceptance to refer the disputes to an arbitrator. In the absence of an arbitration clause in an agreement, as defined in sub-section (4) of Section 7, the dispute/disputes arising between the parties cannot be referred to the arbitral tribunal for adjudication of the dispute.

Supreme Court even in the case of Vijay Kumar Sharma Alias Manju v. Raghunandan Sharma Alias Baburam, (2010) 2 SCC 486 has in paras 17 and 18 held as under:

"17. Sub-sections (2) and (3) of section 7 require that an arbitration agreement shall be in writing (whether it is in the form of an arbitration clause in a contract or in the form of a separate agreement). Sub-section (4) of Section 7 enumerating the circumstances in which an arbitration agreement will be considered as being in writing, is extracted below:

"7(4). An arbitration agreement is in writing if it is contained in -

- (a) a document signed by the parties;
- (b) an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement; or
- (c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

18. In this case, admittedly, there is no document signed by the parties to the dispute, nor any exchange of letters, telex, telegrams (or other means of telecommunication) referring to or recording an arbitration agreement between the parties. It is also not in dispute that there is no exchange of statement of claims or defence where the allegation of existence of an arbitration agreement by one party is not denied by the other. In other words, there is no arbitration

agreement as defined in section 7 between the parties."

Vimal Kishor Shah and Ors. v. Jayesh Dinesh Shah and Ors., MANU/SC/0913/2016 the Supreme Court referring to Section 2(b) of the Arbitration and Conciliation Act, 1996 which defines "arbitration agreement" and also to Section 2(h) which defines "party" and Section 7 has in paras 23 and 24 held as under:

"23. A reading of the aforementioned sections in juxtaposition goes to show that in order to constitute a valid, binding and enforceable arbitration agreement, the requirements contained in Section 7 have to be satisfied strictly. These requirements, apart from others, are (1) there has to be an agreement (2) it has to be in writing (3) parties must sign such agreement or in other words, the agreement must bear the signatures of the parties concerned and (4) such agreement must contain an arbitration clause.

24. In other words, aforementioned four conditions are sine qua non for constituting a valid and enforceable arbitration agreement. Failure to satisfy any of the four conditions would render the arbitration agreement invalid and unenforceable and, in consequence, would result in dismissal of the application filed under Section 11 of the Act at its threshold."

**UNLESS AGREED IN WRITING ARBITRATION
CANNOT BE PRESUMED**

Harsha Constructions vs Union of India & Others

(2014) 9 SCC 246 it was held:- "18. Arbitration arises from a contract and unless there is a specific written contract, a contract with regard to arbitration cannot be presumed. Section 7(3) of the Act clearly specifies that the contract with regard to arbitration must be in writing. Thus, so far as the disputes which have been referred to in Clause 39 of the contract are concerned, it was not open to the Arbitrator to arbitrate upon the said disputes as there was a specific clause whereby the said disputes had been "excepted". Moreover, when the law specifically makes a provision with regard to formation of a contract in a particular manner, there cannot be any presumption with regard to a contract if the contract is not entered into by the mode prescribed under the Act. 19. If a non-arbitrable dispute is referred to an Arbitrator and even if an issue is framed by the Arbitrator in relation to such a dispute, in our opinion, there cannot be a presumption or a conclusion to the effect that the parties had agreed to refer the issue to the Arbitrator. In the instant case, the respondent authorities had raised an objection relating to the arbitrability of the aforestated issue before the Arbitrator and yet the Arbitrator had rendered his decision on the said "excepted" dispute. In our opinion, the Arbitrator could not have decided the said "excepted" dispute. We, therefore, hold that it was not open to the

Arbitrator to decide the issues which were not arbitrable and the award, so far as it relates to disputes regarding non-arbitrable disputes is concerned, is bad in law and is hereby quashed."

ARBITRATION AND ARBITRATORS POWERS

In Union of India v. Rallia Ram, AIR (1963) SC 1685, Court said; "An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception. But the Court cannot interfere with

the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievance in the manner provided by the arbitration agreement."

In U.P. Hotels v. U.P. State Electricity Board, [1989] 1 SCC 359, after referring to Halsbury's Laws of England, 4th edition, Vol. 2, para 624, Mukharji, J. (as his Lordship then was) stated that an award of an arbitrator may be set aside for error of law appearing on the face of it, though that jurisdiction is not lightly to be exercised. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding

on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

In Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr., [1999] 9 SCC 283, Court after considering several decisions on the point, held that if an Arbitrator has acted arbitrarily, irrationally, capriciously or beyond the terms of the agreement, an award passed by him can be set aside. In such cases, the Arbitrator can be said to have acted beyond the jurisdiction conferred on him.

In U.P. State Electricity Board v. Searsole Chemcials Ltd., [2001] 3 SCC 397, Court held that where the Arbitrator had applied his mind to the pleadings, considered the evidence adduced before him and passed an award, the court could not interfere by reappraising the matter as if it were an appeal.

In Indu Engineering & Textiles Ltd. v. Delhi Development Authority, [2001] 5 SCC 691, it was observed that an Arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with.

In Bharat Coking Coal Ltd. v. M/s. Annapurna Construction, [2003] 8 SCC 154, Court held that there is distinction between error within jurisdiction and error in excess of jurisdiction. The role of the Arbitrator is to arbitrate within the terms of the contract and if he acts in accordance with the terms of the agreement, his decision cannot be set aside. It is only when he travels beyond the contract that he acts in excess of jurisdiction in which case, the award passed by him becomes vulnerable and can be questioned in an appropriate court.

Executive Engineer, Dhenkanal Minor Irrigation Division and Ors. v. N.C. Budhraj (Deceased) by Lrs and Ors., [2001] 2 SCC 721. The Court, by majority, held that an arbitrator has power to grant interest for pre- reference period provided there is no prohibition in the arbitration agreement excluding his jurisdiction to grant interest. The forum of arbitration is created by the consent of parties and is a substitute for conventional civil court. It is, therefore, of unavoidable necessity that the parties be deemed to have agreed by implication that the Arbitrator would have power to award interest in the same way and same manner as a court.

WHETHER ARBITRATOR AWARD INTEREST PENDENTE LITE

Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy, [1992] 1 SCC 508. The Court considered several cases and laid down

following principles; "The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge :

(i) A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator.

(ii) An arbitrator is an alternative forum for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the court for that purpose, even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings.

(iii) An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow, as they think fit, so long as they are not opposed to law. (The proviso to section 41 and Section 3 of Arbitration Act illustrate this point). The arbitrator must also act and make his award in accordance with the general law of the land and the agreement.

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite, Thawardas has not been followed in the later decisions of this court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity and certainty is a high desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred."

Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir, [1992] 4 SCC 217. It was held there that an arbitrator is competent to award interest for the period from the date of the award to the date of decree or date of realization, whichever is earlier.

QUESTION OF LIMITATION IN ARBITRATION PROCEEDINGS

In ITW Signode India Ltd. v. Collector of Central Excise MANU/SC/0938/2003 : (2004) 3 SCC 48 a three judge bench of Supreme Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law.

Court in NTPC v. Siemens Atkein Gesell Schaft MANU/SC/1113/2007 : (2007) 4 SCC 451, wherein it was held that the arbitral tribunal would deal with limitation Under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under Sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under Sub-section (6)

a party aggrieved by such an arbitral award may challenge the award Under Section 34.

In M/s. Indian Farmers Fertilizers Cooperative Ltd. v. Bhadra Products MANU/SC/0026/2018 : (2018) 2 SCC 534 Supreme Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal Under Section 16, which is based on Article 16 of the UNCITRAL Model Law which enshrines the Kompetenz principle.

Uttarakhand Purv Sainik Kalyan Nigam Limited vs. Northern Coal Field Limited (27.11.2019 - SC) : MANU/SC/1634/2019

The doctrine of "Kompetenz-Kompetenz", also referred to as "Compétence-Compétence", or "Compétence de la reconnu", implies that the arbitral tribunal is empowered and has the competence to Rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimize judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties.The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement

as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified⁵. If an arbitration agreement is not valid or non-existent, the arbitral tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement.In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator.Sub-section (1) of Section 16 provides that the arbitral tribunal may Rule on its own jurisdiction, "including any objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the arbitral tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator Under Section 16, and not the High Court at the pre-reference stage Under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

ARBITRATOR SHOULD BE IMPARTIAL

In Voestalpine (2015) 3 SCC 800, Court dealt with independence and impartiality of the arbitrator as under: "Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi-judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial." Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more

subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broad-based panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broad-based panel on the aforesaid lines, within a period of two months from today.

**ARBITRATOR APPOINTMENT AFTER 2016
AMENDMENT**

Perkins Eastman Architects DPC and Ors. vs. HSCC (India) Ltd. (26.11.2019 - SC) : MANU/SC/1628/2019

In TRF Limited (2017) 8 SCC 377, the Agreement was entered into before the provisions of the Amending Act (Act No. 3 of 2016) came into force. It was submitted by the Appellant that by virtue of the provisions of the Amending Act and insertion of the Fifth and Seventh Schedules in the Act, the Managing Director of the Respondent would be a person having direct interest in the dispute and as such could not act as an arbitrator. There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a Clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their

arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated.

ONCE AN AWARD IS QUESTIONED UNDER SECTION 34 OF THE ARBITRATION ACT, THE AWARD BECOME UNEXECUTABLE.

Apex Court in the case of National Aluminium Company Limited V/s. Pressteel & Fabrications (P) Ltd., and another reported in (2004)1 SCC 540, once an award is questioned under Section 34 of the Arbitration Act, the award become unexecutable.

INTERIM RELIEF IN ARBITRAL PROCEEDINGS

Hon'ble Supreme Court in M/s.Sundaram Finance Ltd. vs. M/s.NEPC India Ltd. (A.I.R. 1999 SC 564)

the Supreme Court held that it was open to the Court to put the applicant on terms, which will ensure that arbitral proceedings will be commenced. In that case,

the Supreme Court dealt with the scope of the orders under Section 9 under the 1996 Act. In the present case, the learned counsel for the respondent submitted that if notice is issued before the advocate commissioner is appointed, then the purpose for filing the application will be defeated and that is why they referred to decisions where it has been held that pre-seizure notice is not required. In the Sundaram Finance's case, the Supreme Court observed that "It is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect its interest." and therefore, the Supreme Court held that it is not possible to interpret the word 'before' in Section 9 to mean that unless notice under section 21 is received by the respondent, no party would have a right to apply for interim measure. Therefore, it is clear that an ex parte order can be passed. In the same judgment, the Supreme Court has also referred to the power to grant Mareva injunction and held that "the power to grant an interim injunction under section 44 of the Act extends to the granting of a Mareva injunction in appropriate cases. It may also include granting an interim mandatory injunction, although the Court will be slow to grant an injunction which provides a remedy of essentially the same kind as is ultimately being sought from the arbitral tribunal". The Supreme Court held that if an application under section 9 is made "the Court will first have to be

satisfied that there exists a valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied the Court will have the jurisdiction to pass orders under Section 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the Court while exercising jurisdiction under Section 9 can pass conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings."

Hon'ble Supreme Court in the case of Firm Ashok Traders vs. Gurumukh Das Saluja (A.I.R. 2004 SC 1433) - In the said decision, Their Lordships of the apex Court, while dealing with the scope of Section 9 of the Act, held that the expression "interim relief" that is sought for by a party, or granted by the Court, shall fall within the meaning of the expression "an interim measure of protection." Their Lordships clarified that "there is clear distinction between 'permanent protection' and 'interim protection.'" Their Lordships of the apex Court further observed: "...the party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended and are positively going to commence within a reasonable

time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses." It was further observed by Their Lordships, with caution: "If arbitral proceedings are not commenced within a reasonable time of an order under Section 9, the relationship between the order under Section 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made 'before' i.e., in contemplation of arbitral proceedings."

Hon'ble Supreme Court in Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd. (A.I.R.2007 SC 2563) has held as under: "10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant

of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act."

Madras High Court in Chola mandalam DBS Finance Ltd., V. Sudheesh Kumar, 2010 (1) CTC 481 (DB) [2010] 2 MLJ 448, where the Division Bench has framed the following guidelines for passing interim order of protection under Section 9 of the Act: "25. The guidelines are : a) If the pleadings in the affidavit make out that it is just and convenient to grant interim orders, and if, prima facie, the balance of convenience is in favour of the applicant, then an

ex parte order appointing an advocate commissioner may be passed, but simultaneously notice shall be ordered to go to the respondent indicating the date of hearing of the application. It is open to the learned counsel for the appellant to get permission of the Court to also serve private notice on the respondents personally at the time when the vehicle is seized. But, an affidavit must be sworn to by the Advocate Commissioner that the person who received the notice was authorised to do so and that it was not given to some third party who was not responsible or who was not authorised to acknowledge any court notice on behalf of the respondents;

b) After the advocate commissioner reports to the Court that the vehicle has been seized, it shall be in the custody of the applicant. This custody is on behalf of the Court, i.e., the applicant will be holding it in custodia legis.

c) Of course, if even after notice, the borrower does not appear or if it appears to the Court that the borrower is deliberately evading notice, then it is open to the applicant to pray for such reliefs as are necessary, which may even include the sale of vehicle and the matter may be heard ex parte and orders passed in exercise of discretion of Court.

d) The application shall not be closed without hearing the other side after notice is served. Before closing the application, the Court shall also ascertain whether the applicant has taken steps to initiate the arbitral proceedings. If the applicant has not done so, then

orders shall be passed putting the applicant on terms as laid down in *Sundaram Finance Limited v. NEPC India Ltd.*, (A.I.R. 1999 SC 564), because section 9 depends on a close nexus with the initiation of arbitral proceedings;

e) As regards the expenditure incurred for keeping the vehicle in custody, the applicant shall bear it until the respondent is served and appears. After that, the Court shall hear the parties and pass orders.

f) The remuneration for advocate commissioners appointed by this Court shall be commensurate with the work done, since the financiers will shift this burden only on the already beleaguered borrower.

One other advantage in hearing the respondent before the closing of application is the clue that we get from *Firm Ashok Traders v. Gurumukh Das Saluja*, AIR 2004 SC 1433, where the Supreme Court encouraged the parties to suggest a solution. If that is really possible, then even at the initial stage, the entire matter will come to a happy resolution. Therefore, it is not only in the interest of natural justice and fairness, but also as a pragmatic measure that we have laid down these guidelines."

In (2007) 7 SCC 125 (Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.), the Supreme Court had clearly held that "it is difficult to imagine that the legislature while enacting section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an

interim injunction". The Supreme Court again repeats and reiterates that "Section 9 itself brings in the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of Section 9, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act."

ARBITRATION CLAUSE CONTAINED IN THE MAIN CONTRACT WOULD NOT APPLY TO THE DISPUTES ARISING WITH REFERENCE TO THE SUB-CONTRACT

In M.R. Engineers & Contractors Pvt. Ltd. v. Som Datt Builders Ltd., (2009) 7 SCC 696, the Court held: "24. The scope and intent of Section 7(5) of the Act may therefore be summarised thus:

(i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled: (1) the contract should contain a clear reference to the documents containing arbitration clause, (2) the reference to the other document should clearly indicate an intention

to incorporate the arbitration clause into the contract, (3) the arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.

(ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.

(iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.

(iv) Where the contract provides that the standard form of terms and conditions of an independent trade or professional institution (as for example the standard terms and conditions of a trade association or architects association) will bind them or apply to the contract, such standard form of terms and conditions including any provision for arbitration in

such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.

(v) Where the contract between the parties stipulates that the conditions of contract of one of the parties to the contract shall form a part of their contract (as for example the general conditions of contract of the Government where the Government is a party), the arbitration clause forming part of such general conditions of contract will apply to the contract between the parties.”

COUNTERCLAIM IN ARBITRATION PROCEEDINGS

The Hon'ble Supreme Court had an occasion to consider the separate claim under the provisions of Section 11 of the Act in the case of State Of Goa vs M/S Praveen Enterprises reported in (2012) 12 SCC 581 wherein at paragraph-32, it has been held as under: 32. A counterclaim by a respondent presupposes the pendency of proceedings relating to the disputes raised by the claimant. The respondent could no doubt raise a dispute (in respect of the subject-matter of the counterclaim) by issuing a notice seeking reference to arbitration and follow it by an application under Section 11 of the Act for appointment of arbitrator, instead of raising a counterclaim in the pending arbitration proceedings.

The object of providing for counterclaims is to avoid multiplicity of proceedings and to avoid divergent findings. The position of a respondent in an arbitration proceeding being similar to that of a defendant in a suit, he has the choice of raising the dispute by issuing a notice to the claimant calling upon him to agree for reference of his dispute to arbitration and then resort to an independent arbitration proceeding or raise the dispute by way of a counterclaim, in the pending arbitration proceedings.

CHAPTER - 17

MISCELLANEOUS

LOAN ACCOUNT DUES AND DEPOSIT ACCOUNTS

In *Kesharichand Jaisukhal V.Shillong Banking Corporation*, AIR 1965 SC 1711, the Supreme Court was considering a transaction wherein the client had a combined overdraft and deposit account with the bank. The Supreme Court reiterated that where there have been reciprocal demands between the parties, Article 1 of the Schedule of the Act (in that case Article 85 of the Indian Limitation Act, 1908) would be applicable. It was held that the loans by the bank created obligation on the client for repayment, which was independent of the bank's obligation to repay the amount of the cash deposits and to account for the cheques/hundies and drafts deposited for collection.

SUIT FOR SUM OF MONEY DUE IN A FOREIGN CURRENCY

Supreme Court in the case of *Meenakshi Saxena v. ECGC Limited*, (2018) 7 SCC 479 that when the plaintiff sues for the sum of money, due in a foreign currency, after converting it into Indian Rupees, then, in the absence of any express contractual rate, he may do so at the conversion rate prevailing on the date when the amount became payable or on the date of the filing of the suit.

ALLEGATIONS OF FRAUD ON SALE OF MORTGAGED PROPERTY

Rukmini Amma and Ors. vs. Rajeswary Dead through L.Rs. and Ors. AIR 2013 SC 428 If the mortgaged properties were, thus, brought to sale to meet the agricultural income tax liability of the mortgagor it was upon the mortgagor himself to have met that liability in order to ensure that the property was kept intact free from any encumbrance even at the hands of the mortgagee. Therefore, the purchase made by the son of the mortgagee cannot be held to be a fraudulent sale or a deceptive one in the absence of any specific allegation to that effect at the instance of the mortgagor. To our dismay in the plaint except alleging fraud on the mortgagee by stating that it was a collusive sale there was nothing brought out in evidence either oral or documentary' to support the said stand.

HOW TO CONSIDER A TRANSACTION AS BENAMI

Valliammal v. Subramaniam MANU/SC/ 0699/ 2004 : (2004) 7 SCC 233 that while considering whether a particular transaction is benami in nature, the following six circumstances can be taken as a guide:

- (1) the source from which the purchase money came;
- (2) the nature and possession of the property, after the purchase;
- (3) motive, if any, for giving the transaction a benami colour;

- (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
- (5) the custody of the title deeds after the sale; and
- (6) the conduct of the parties concerned in dealing with the property after the sale.

In case of Thakur Bhim Singh v. Thakur Kan Singh MANU/SC/0516/1979 : (1980) 3 SCC 72; it was observed and held by this Court that, while considering a particular transaction as benami, intention of person who contributed purchase money was determinative of nature of transaction. It was further observed by this Court as to what intention of person who contributed purchase money, had to be decided on basis of surrounding circumstance; relationship of parties; motives governing their action in bringing about transaction and their subsequent conduct etc.

UNSCRUPULOUS AND UN HEALTHY PRACTICES

Court in *Central Bank of India v. Ravindra*, MANU/SC/0663/2001 : (2002) 1 SCC 367 at 402. This judgment states: During the course of hearing it was brought to our notice that in view of several usury laws and debt relief laws in force in several States private money-lending has almost come to an end and needy borrowers by and large depend on banking institutions for financial facilities. Several unhealthy practices having slowly penetrated into prevalence

were pointed out. Banking is an organised institution and most of the banks press into service long-running documents wherein the borrowers fill in the blanks, at times without caring to read what has been provided therein, and bind themselves by the stipulations articulated by the best of legal brains. Borrowers other than those belonging to the corporate sector, find themselves having unwittingly fallen into a trap and rendered themselves liable and obliged to pay interest the quantum whereof may at the end prove to be ruinous. At times the interest charged and capitalised is manifold than the amount actually advanced. Rule of damdupat does not apply. Penal interest, service charges and other overheads are debited in the account of the borrower and capitalised of which debits the borrower may not even be aware. If the practice of charging interest on quarterly rests is upheld and given a judicial recognition, unscrupulous banks may resort to charging interest even on monthly rests and capitalising the same. Statements of accounts supplied by banks to borrowers many a times do not contain particulars or details of debit entries and when written in hand are worse than medical prescriptions putting to test the eyes and wits of the borrowers. Instances of unscrupulous, unfair and unhealthy dealings can be multiplied though they cannot be generalised. Suffice it to observe that such issues shall have to be left open to be adjudicated upon in appropriate cases as and when actually arising for decision and we cannot venture into laying

down law on such issues as do not arise for determination before us. However, we propose to place on record a few incidental observations, without which, we feel, our answer will not be complete and that we do as under:

(6) Agricultural borrowings are to be treated on a pedestal different from others. Charging and capitalisation of interest on agricultural loans cannot be permitted in India except on annual or six-monthly rests depending on the rotation of crops in the area to which the agriculturist borrowers belong.

Jayant Verma and Ors. vs. Union of India (UOI) and Ors. (16.02.2018 - SC) : MANU/SC/0133/2018 - AIR 2018 SC 1079 - Given the fact that, at present, agricultural loans are predominantly given by cooperative and other banks to farmers, the method suggested by Shri Bhushan, which is to exclude banks from the entry "relief of agricultural indebtedness", would rob the aforesaid entry of most of its force and render it largely otiose.

ASSIGNMENT OF CONTRACT

A Constitution Bench of Supreme Court in Khardah Company Ltd v. Raymon & Co (India) Private Ltd., AIR 1962 SC 1810 has laid out this principle as follows: "...An assignment of a contract might result by transfer either of the rights or of the

obligations thereunder. But there is a well-recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.”

Similarly, in Indu Kakkar v. Haryana State Industrial Development Corporation Ltd. and Another, (1999) 2 SCC 37, the Respondent Corporation allotted certain land subject to the condition that the allottee shall complete construction of a building unit on the plot within a period of two years. Upon the allottee’s failure to comply with the said condition, the Respondent resumed the land. The allottee filed a civil suit challenging the resumption order, during the pendency of which he assigned his rights in the plot to the Appellant. The issue was whether such an assignee could challenge the resumption order. Court held, in reliance upon *Khardah Company (supra)*, that: “19....Answer of the said question depends upon the terms of allotment. Assignment by act of parties may cause assignment of rights or of liabilities under a contract. As a rule a party to a contract cannot transfer his liabilities under the contract without consent of the other party. This

rule applies both at the Common Law and in Equity (vide para 337 of Halsbury's Laws of England, Fourth Edition, Part 9). Where a contract involves mutual rights and obligations an assignee of a right cannot enforce that right without fulfilling the co- relative obligations."

**GENERAL PRINCIPLES GOVERNING
ASSIGNABILITY OF CONTRACTS**

Supreme Court of India - Kapilaben vs Ashok Kumar Jayantilal Sheth ... Decided on 25 November, 2019 - CIVIL APPEAL NOS. 10683-86 OF 2014

1. Upon considering the facts and circumstances of the present case, it is evident that there is no privity of contract between the Appellants and Respondent Nos. 1. Respondent Nos. 1 were not party to the 1986 agreement. Vice versa, the Appellants were not party to the 1987 agreements, though whether or not they had knowledge of the same is disputed. Hence Respondent Nos. 1 cannot seek specific performance of the 1986 agreement, or for that matter, the 1987 agreements, against the Appellants, except by suing as 'representatives-in-interest' of the original vendees under Section 15(b) of the Specific Relief Act.

2. It is well-settled that the term 'representative-in-interest' includes the assignee of a contractual interest. Though the provisions of the Contract Act do not particularly deal with the assignability of contracts, this Court has opined time and again that

a party to a contract cannot assign their obligations/liabilities without the consent of the other party.

3. In *Khardah Company*, the Appellant jute manufacturers were entitled to receive price for the jute from the buyer/dealer of jute only upon delivery of certain shipping documents. Question arose as to whether such an obligation coupled with a benefit was assignable. This Court held, based on the above-mentioned principle, that the terms of the contract strongly implied that the rights thereunder are non-transferable. Similarly held in *Indu Kakkar* case.

4. Even in a case of assignment of rights simplicitor, such assignment would necessarily require the consent of the other party to the contract if it is of a 'personal nature'.¹

5. It is true that Section 15(b) of the Specific Relief Act does not specifically state that 'obligations' may not be assigned except with the consent of the other party. However a reading of Section 15(b) shows that it is nothing but a statutory formulation of the ratio laid down in the above-mentioned precedents. The rule

¹ The Indian Contract and Specific Relief Acts (R. Yashod Vardhan, and Chitra Narayan eds., 15 th edn., Vol. I) at page 730: "A contract which is such that the promisor must perform it in person, viz. involving personal considerations or personal skill or qualifications (such as his credit), are by their nature not assignable. The benefit of contract is assignable in 'cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it.' The contractual rights for the payment of money or to building work, for e.g., do not involve personal considerations."

stated in Section 15(b) is that any interest in a contract can be specifically enforced by the assignee thereof, except where the 'personal quality' of the party is a material ingredient in the contract; or where the contract, expressly or by necessary implication, prohibits the beneficiary from transferring their contractual interest to third parties. Hence Section 15(b) does not contradict the general law on assignability of contracts as laid down by this Court, but rather clarifies that the same conditions will have to be satisfied if an assignee seeks to secure specific performance of the assigned contract. Therefore, for example, a contract for a singing performance or a painting may not be assignable as it involves a personal skill and even if it is assigned, the assignee cannot seek specific performance in respect of such a contract. Whereas it may be said that general contracts for payment of money or building work do not involve any personal considerations, as it makes no difference as to who discharges the obligation to pay or perform a certain act under the contract. Hence the assignees of parties to such contracts may seek specific performance.

6. It is important to note that in the modern context where parties frequently enter into complex commercial transactions, it is perhaps not so convenient to pigeonhole contracts as being either 'general' or of 'personal nature' or as involving the assignment of purely 'rights' or 'obligations'. It is possible that a contract may involve a bundle of

mutual rights and obligations which are intertwined with each other. However, as this Court has held in *Indu Kakkar (supra)*, the same rule as laid down in *Khardah Company (supra)* and as stated in Section 15(b) of the Specific Relief Act, may be applied to such contracts as well. Where the conferment of a right or benefit is contingent upon, or coupled with, the discharge of a burden or liability, such right or benefit cannot be transferred without the consent of the person to whom the co-extensive burden or liability is owed. It further has to be seen whether conferment of benefits under a contract is based upon the specific assurance that the co- extensive obligations will be performed only by the parties to the contract and no other persons. It would be inequitable for a promisor to contract out his responsibility to a stranger if it is apparent that the promisee would not have accepted performance of the contract had it been offered by a third party. This is especially important in business relationships where the pre-existing goodwill between parties is often a significant factor influencing their decision to contract with each other. This principle is already enshrined in Section 40 of the Contract Act. Hence in a case where the contract is of personal nature, the promisor must necessarily show that the promisee was agreeable to performance of the contract by a third person/assignee, so as to claim exemption from the condition specified in Section 40 of the Contract Act. Hence, in light of the above discussion, whether or not an assignee can seek

specific performance would depend upon the construction of the contract in each case. The Court would have to determine the nature of interest sought to be transferred, whether such interest was meant to be enforceable only between the parties to the contract and whether the contract expressly or by necessary implication bars assignment of such interest.

LITIGANT CANNOT TAKE CONTRARY STANDS

Suzuki Parasrampur Private Limited v. Official Liquidator of Mahendra Petrochemicals Limited, (2018) 10 SCC 707. The observations made are extracted hereunder: “12. A litigant can take different stands at different times but cannot take contradictory stands in the same case. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The untenability of an inconsistent stand in the same case was considered in *Amar Singh v. Union of India*, (2011) 7 SCC 69, observing as follows: (SCC p. 86, para 50) “50. This Court wants to make it clear that an action at law is not a game of chess. A litigant who comes to court and invokes its writ jurisdiction must come with clean hands. He cannot prevaricate and take inconsistent positions.”.....13. A similar view was taken in *Joint Action Committee of Air Line Pilots’ Assn. of India v. DGCA*, (2011) 5 SCC 435, observing: (SCC p. 443, para 12) “12. The doctrine of election is based on the rule of estoppel—the principle that one

cannot approbate and reprobate inheres in it. The doctrine of estoppel by-election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. ... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.”

In Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420) it was observed: “A party cannot be permitted to “blow hot and cold”, “fast and loose” or “approbate and reprobate”. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.”

In R.N. Gosain v. Yashpal Dhir, AIR 1993 SC 352, it was held: “10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that ‘a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid,

and then turn round and say it is void for the purpose of securing some other advantage’.”

**State of Punjab and Ors. vs. Dhanjit Singh Sandhu
AIR 2014 SC 3004 : MANU/SC/0202/2014** - The

doctrine of "approbate and reprobate" is only a species of estoppel, it implies only to the conduct of parties. As in the case of estoppel it cannot operate against the provisions of a statute. (vide C.I.T. v. Mr. P. Firm Maur MANU/SC/0143/1964 : AIR 1965 SC 1216). It is settled proposition of law that once an order has been passed, it is complied with, accepted by the other party and derived the benefit out of it, he cannot challenge it on any ground. (Vide Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and Ors. MANU/SC/0386/1968 : AIR 1969 SC 329). Court in Sri Babu Ram Alias Durga Prasad v. Sri Indra Pal Singh (Dead) by L.Rs. MANU/SC/0519/1998 : AIR 1998 SC 3021, and P.R. Deshpande v. Maruti Balram Haibatti MANU/SC/0491/1998 : AIR 1998 SC 2979, the Supreme Court has observed that the doctrine of election is based on the rule of estoppel the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The Supreme

Court in The Rajasthan State Industrial Development and Investment Corporation and Anr. v. Diamond and Gem Development Corporation Ltd. and Anr. MANU/SC/0116/2013 : AIR 2013 SC 1241, made an observation that a party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience.It is evident that the doctrine of election is based on the rule of estoppel the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppel in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.

DISCHARGE OF CONTRACT BY AGREEMENT

In National Insurance Company Limited v. M/s. Boghara Polyfab Private Limited, AIR 2009 SC 170,
Court held:

"26. When we refer to a discharge of contract by an agreement signed by both the parties or by execution of a full and final discharge voucher/receipt by one of

the parties, we refer to an agreement or discharge voucher which is validly and voluntarily executed. If the party which has executed the discharge agreement or discharge voucher, alleges that the execution of such discharge agreement or voucher was on account of fraud/coercion/undue influence practised by the other party and is able to establish the same, then obviously the discharge of the contract by such agreement/voucher is rendered void and cannot be acted upon. Consequently, any dispute raised by such party would be arbitrable."

29. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both the parties or by the party seeking arbitration):

(a) where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt, nothing survives in regard to such discharged contract;

(b) where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations;

(c) where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there are no outstanding claims or disputes."

In R.L. Kalathia v. State of Gujarat, (2011) 2 SCC 400, this court considered a similar issue and held:

"(i) Merely because the contractor has issued "no-dues certificate", if there is an acceptable claim, the court cannot reject the same on the ground of issuance of "no-dues certificate".

(ii) Inasmuch as it is common that unless a discharge certificate is given in advance by the contractor, payment of bills are generally delayed, hence such a clause in the contract would not be an absolute bar to a contractor raising claims which are genuine at a later date even after submission of such "no-claim certificate".

(iii) Even after execution of full and final discharge voucher/receipt by one of the parties, if the said party is able to establish that he is entitled to further amount for which he is having adequate materials, he is not barred from claiming such amount merely because of acceptance of the final bill by mentioning "without prejudice" or by issuing "no-dues certificate".

RELEVANCY OF STATEMENT OF DEAD PERSON IN CIVIL CASES

Bhagawati Prasad v. Rameshwari Kuer , 1952 AIR 72, 1952 SCR 603 wherein it has been held that the statements of a particular person that he is separated from a joint family of which he was a coparcener and that he has no further interest in the joint property or claim to any assets left by his father, would be a statement made against the interest of such person, and after such person is dead, they would be relevant under Section 32 of the Evidence Act. " There is no reason to doubt the truth of these statements which were made in an old document long before any dispute arose between the parties in regard to these matters. A question was raised, however, as to whether this statement of Imrit could be legally admissible as evidence. Imrit is undoubtedly dead and Mr. Kunzru, appearing for the respondents, contended that this statement could be admitted in evidence under section 32 (7) of the Indian Evidence Act. We are not sure that section 32 (7) is really of assistance to the respondents. The particular right, which is the subject-matter of dispute before us, was certainly asserted in this transaction but not by it within the meaning of section 13 (a) of the Evidence Act. We think, however, that the statements could be admitted under section 32 (3) of the Evidence Act. The statements of a particular person that he is separated from a joint family, of which he was a coparcener, and that he has no further interest in the joint property or claim to any assets left by his father, would be statements made against the interest of such

per- son, and, after such person is dead, they would be relevant under section 32(3) of the Evidence Act. The assertion that there was separation not only in respect of himself but between all the coparceners would be admissible as a con- nected matter and an integral part of the same statement."

COURT HAS THE DISCRETION TO APPOINT A RECEIVER FOR THE PROPERTY IN SUIT, WHERE IT APPEARS JUST AND CONVENIENT

Aisamma v. Mohammad, (1967) 2 Mys LJ 586.

Govinda Bhat, J. as he then was, stated in the said case as:- "The expression 'just and convenient' in Order 40, Rule 1, C.P.C. means that the Court should make appointment of a receiver for protection of rights or prevention of injury. The Court has to consider whether special interference with the possession of the party to the suit is required, there being well-founded fear that the property in question will be dissipated or that irreparable mischief may be done, unless the Court gives its protection. The discretion of the Court has to be exercised for the purpose of promoting ends of justice." "The fact that the Court has the discretion to appoint a Receiver for the property in suit, where it appears just and convenient, does not mean that the Court has to appoint a Receiver merely because the Court thinks it convenient; the expression 'just and convenient' means that the Court should make the appointment for protection of rights or prevention of injury. The

Court has to consider whether special interference with the possession of the party to the suit is required, there being well-founded fear that the property in question will be dissipated or that irreparable mischief may be done, unless the Court gives its protection."

Muppanna vs State Of Karnataka, ILR 2007 KAR 3424, 2007 (6) KarLJ 80 The object of appointment of receiver by the Civil Court is to preserve the property and for this purpose it has to manage the same. On cessation of the receiver appointed by the Court, the superintendence is withdrawn, which means, the person who held the land prior to appointment of receiver is entitled to enter the property and manage its affairs as he deems fit.

Harinagar Sugar Mills Ltd vs M. W. Pradhan 1966 AIR 1707, 1966 SCR (3) 948 In India, the scope of the receiver's power is governed by the express provisions of the Code of Civil Procedure. It is common place that a receiver appointed by court has no estate or interest himself and the scope of his Power is defined by the provisions of O.XL of the said Code and the specific- orders made by the Court thereunder. He is frequently spoken to as the "hand of the Court". In exercise of the power under the said cl. (d) if a court confers upon the receiver power to bring a suit to realise the assets which are the subject-matter of the suit, it cannot be denied that the said receiver can file

suits to recover the debts forming part of the said assets.

In Kanhaiyalal v. Dr. D.R. Banali, AIR 1958 SC 725 at p. 729 it was observed: "A receiver appointed under 0.40 of the Code of Civil Procedure, unlike a receiver appointed under the insolvency Act, does not own the property or hold any interest therein by virtue of a title. He is only the agent of the Court for the safe custody and management of the property during the time that the Court exercises jurisdiction over the litigation in respect of the property."

In Chaitanya Naiko v. Kandhino Naiko and others, , AIR 1965 Ori 217, it was held that the Court will not as a general rule appoint a receiver in a partition suit between members of a joint family especially where the family property consists of immovable property and to appoint a receiver in such a case, special circumstances must be proved. However, a receiver may be appointed in a partition suit where there is a prima facie case of misappropriation by the manager of the family. But the Court in exercising its discretion must proceed with caution and examine all the circumstances keeping in view the legal principle that it should not appoint a receiver of property in possession of the defendant, who claims it by legal title, unless the plaintiff can show prima facie that he has a strong case and good title to the property. The mere circumstances that the appointment of a

receiver will do no harm to anyone is no ground for appointing a receiver. Moreover the Court should be cautious about putting a third party as a receiver of properties in the possession and enjoyment of members of a joint family and thereby disturbing their possession. It is further, necessary to consider whether such interference with the possession of a defendant is required. It is only if there is Well founded fear that the property in question will be dissipated or other irreparable mischief may be done that the Court gives its protection.

Rasi Dei vs Bikal Maharana And Ors. AIR 1965 Ori

20:- The appointment of receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the person seeking the appointment of a receiver is exposed to manifest peril. Therefore, this exceedingly delicate and responsible duty has to be discharged by the Court with the utmost caution. The principles to be followed for appointment of receiver as laid down are these; Not only must the plaintiff show a case of adverse and conflicting claim to property, but he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. An order appointing a receiver will not be made where it has the effect of depriving a defendant of a de facto

possession since that might cause irreparable wrong. The high prerogative act of taking property out of the hands of one and putting it in pound under the order of the Judge ought not to be taken except to prevent manifest wrong imminently impending.

Hence the Court should not appoint a receiver of property in the possession of the defendant who claim it by legal title, unless the plaintiff can show prima facie that he has a strong case and good title to the property. The Court must consider whether special interference with the possession of defendant is required, there being well founded fear that the property in question will be disputed or other irreparable mischief may be done unless the court gives protection. The mere circumstance that the appointment of a receiver will do no harm to anyone is no ground for appointing a receiver.

Maharaj Jagat Singh vs Sawai Bhawani Singh And Ors. ILR 1991 Delhi 475

Thus it is clear that a receiver is to be appointed if there is no other adequate remedy in the facts and circumstances of the case. However, in order to get a receiver appointed, emergency or danger or loss calling for immediate action is to be established. It must also be apparent that the plaintiff has prima facie an excellent chance of succeeding in the suit. A receiver will not be appointed merely because it does no harm to appoint a receiver. A receiver ought not to be appointed where it has the effect of depriving a person of de facto

possession as that might cause irreparable wrong. The conduct of parties making an application has to be free from blame and there must be a "well founded fear that in the absence of protection the property will be dissipated or irreparably lost".

Sreenivas Lad vs Ekanath And Ors. AIR 2005 Kant 405, 2005 (6) KarLJ 62

The principles of law as would emerge from the extensive case-law cited would be: "A receiver may be appointed by Court when it appears to the Court just and convenient. The five principles upon which a Court can appoint a receiver are: (1) it is a matter resting in the discretion of the Court for the purpose of protecting the rights of all parties and the subject-matter; (2) the Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has an excellent chance of success in the suit; (3) not only the plaintiff must show a case of adverse and conflicting claims to property, but he must show some emergency or danger or loss, demanding immediate action and of his own rights he must be reasonably clear and free from doubt; (4) an order will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong; the position however may be different if the property is shown to be in media, that is to say, in the enjoyment of none; and (5) the Court should look to the conduct of the party who makes the

application who must come to Court with clean hands.”

Sreenivas Lad vs Ekanath And Ors. AIR 2005 Kant 405, 2005 (6) KarLJ 62

The power to appoint a receiver is discretionary and the discretion has to be used in accordance with the principles on which judicial discretion must be exercised. The phrase "just and convenient" appearing in Order 40, Rule 1 of the CPC mean that the Court should appoint a receiver for the protection of the property or the prevention of injury, according to legal principles and not because the Court simply thinks convenient to do so. The phrase would denote what is practicable and what the interests of justice require. The discretion exercised should be sound and reasonable. Powers of the Court under Order 40, Rule 1 of the Code of Civil Procedure, 1908 is to be exercised to advance the cause of justice and what is "just and convenient" depends upon the nature of the claim and the surrounding circumstances, and in a manner with care, caution and restraint so as to subserve the ends of justice. The claim of the appellant to the suit relief is capable of being established only after a full-fledged trial of disputed facts. However, it is not in dispute that the appellant is not a total stranger laying claim to the suit properties without any basis. The allegations of a methodical concealment of the true and actual quantum of the income accruing from the utilisation

of the suit properties by recourse to several alleged methods, is not, however, established prima facie. At the same time, it is contended on behalf of the respondents having regard to the nature of business, namely the income of the firm earned through its mining lease, the accounts are necessarily transparent as the mineral extracted, transported and sold is strictly regulated statutorily and therefore the income of the firm is ascertainable at all times and hence it would be unnecessary even to seek accounts at this point of time at the instance of the appellant.

Vijai Kumar vs Smt. Kiran Devi And Ors. AIR 2007

Pat 166, In a plethora of other decisions various High Courts as well as the Hon'ble Apex Court decided the various issues with respect to the appointment of a receiver in a suit in view of the provisions of law and various case laws. Taking into account the specific provisions of law as well as the views expressed in various decisions as aforesaid, the Madras High Court passed a land mark judgment in case of T. Krishnaswamy Chetty v. C. Thangavelu Chetty and Ors. prescribing the five essential requirements for appointment of receiver. The said five principles which were laid down by the said decision as 'Punch Sadachar' are as follows:

(i) Appointment of a receiver pending a suit is a matter resting in the discretion of the court;

- (ii) No receiver should be appointed except upon proof that plaintiff has a very excellent chance of succeeding in the suit;
- (iii) Plaintiff must show some emergency or danger or loss demanding immediate action;
- (iv) Receiver should not be appointed where it has the effect of depriving a defendant of his 'de facto' possession; and
- (v) the court should look into the conduct of the party who makes application.

12. So far the first principle is concerned, it is well settled that the court considering the matter of receivership is exercising an equity jurisdiction and in such cases, the discretion of the court should not be arbitrary or absolute, rather it should be a sound and judicial discretion taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice and protecting the rights of the parties and the subject matter of the suit and also when there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

13. So far the second principle is concerned, the appointment of Receiver cannot be legally equated with the issuance of an order of injunction. For an order of injunction prima facie case has to be shown, but in case of appointment of Receiver a prima facie case would not be sufficient, rather the plaintiff has to show that he has a very excellent chance of

succeeding in the suit without which no order of appointment of Receiver can be passed.

14. So far the third principle is concerned, merely showing a case of adverse and conflicting claims to property will not suffice, rather the plaintiff has to show some emergency or danger demanding immediate action. In such a case the right of plaintiff must be reasonably clear and free from any doubt and in addition to that the element of danger to the suit property is very important in such matters and the Page 2967 court should appoint a Receiver only when there is a great and imminent danger demanding immediate relief.

15. So far the fourth principle is concerned, if a Receiver is appointed with respect to a property in which the defendant has a de facto possession, it would naturally amount to deprive the defendant from his right which might cause irreparable wrong. Hence in case of title only the court should be very reluctant to disturb possession of a party by appointment of a Receiver. Receiver can be appointed only when the property is exposed to imminent danger and emergency and the person in possession has obtained it through fraud or force requiring interposition by Receiver for the security of the property.

16. So far the fifth principle is concerned, the court should usually refuse to interfere unless the conduct of the plaintiff is free from blame and he has come to the court with clean hands and has not been disentitled to the equitable relief by his/her laches,

delay, acquiescence etc. A Receiver should not be appointed in supersession of a bona fide possessor of property in controversy and bonafides of possessor have to be presumed until the contrary is established.

SCOPE OF WRIT JURISDICTION ¹

Supreme Court of India in the case of State of Orissa v. Madan Gopal Rungta MANU/SC/0012/1951 : [1952] 1 SCR 28 has held that no writ petition is maintainable only for the purpose of stay order when the writ petition which was entertained by the High Court under Article 226 for the purpose of interim relief, as the suit could not have been filed in view of section 80 C.P.C. and unavoidable delay might result in irreparable loss to the petitioner, was found to be not justifiable by the Supreme Court. "In our opinion, Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application as the High Court has purported to do. The directions have been given here only to circumvent the provisions of Section 80 C.P.C. and in our opinion that is not within the scope of Article 226".

P.G.I. of Medical Education and Research, Chandigarh v. Raj Kumar, MANU/SC/0829/2000 : 2001 (2) SCC 54, paragraph 9, the Supreme Court

¹ Justice R.B. Mishra, of UP High Court in the case of UOI vs. Balrampur - MANU/UP/0130/2003 - 2003 UPTC, 982

has held as follows: " It is not for the High Court to go into the factual aspect of the matter and there is an existing limitation to that effect....The law is well settled to the effect that finding of the Labour Court cannot be challenged in a proceeding in a writ of certiorari on the ground that the relevant and material evidence adduced before the labour Court was insufficient or inadequate through, however, perversity of the order would warrant intervention of the High Court. The observation, as above, stands well settled since the decision of this Court in *Syed Yakoob v. K.S. Radhakrishanan*." *Ashok Kumar and Ors. v. Site Ram* MANU/SC/0273/2001 : [2001]3SCR101 , paragraph 10, the Supreme Court has took the similar view.

A constitution Bench of the Supreme Court, in *G. Veerappa Pillai V. Raman & Raman Ltd.* MANU/SC/0057/1952 : [1952]1SCR583 , held that as the Motor Vehicles Act is a self contained code and itself provides for appealable/revisable forum, the writ jurisdiction should not be involved in matters relating to its provisions.

In *C.A. Ibrahim v. ITO*, AIR 1961 and *H.B. Gandhi v. Gopinath & Sons*, 1992 (Suppl).2 SCC 312, the Supreme Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

The Constitution Bench of the Supreme Court in K.S. Venkataraman & Co. v. State of Madras MANU/SC/ 0293/1965 : AIR 1966 SC 1089, considered the Privy Council, AIR 1947 PC 78 and held that the writ court can entertain the petition provided the order is alleged to be without jurisdiction or has been passed in flagrant violation of the principles of natural justice, or the provisions of the Act/Rules is under challenge.

In Whirlpool Corporation v. Registrare of Trade Marks MANU/SC/0664/1998 : AIR 1999 SC 22 ; and **Tin Plate Co. of India Ltd. v. State of Bihar MANU/SC/0687/1998 : AIR1999SC74** the Supreme Court came to the conclusion that writ should not generally be entertained if statute provide for remedy of appeal and even if it has been admitted, parties should be relegated to the appellate forum.

In Sheela Devi v. Jaspal Singh MANU/SC/0825/1999 : AIR 1999 SC 2859 , the Hon'ble Supreme Court has held that if the statute itself provides for a remedy of revision, writ jurisdiction cannot be invoked.

In Punjab National Bank v. O.C. Krishnan and Ors. AIR 2001 SCW 2993, the Supreme Court while considering the issue of alternative remedy observed as under: "The Act has been enacted with a view to

provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast tract procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provisions under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

A Constitution Bench of the Supreme Court, in KS. Rashid & Sons v. Income Tax Investigation Commission and Ors MANU/SC/0123/1954 : AIR 1954 SC 207, held that Article 226 of the Constitution confers on all the High Court a very wide power in the matter of issuing writs. The said power is limited. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere.

Supreme Court in Sangram Singh v. Election Tribunal, Koto MANU/SC/0044/1955 : [1955] 2 SCR 1 , holding that the power of issuing writs are purely discretionary and no limit can be placed upon that discretion. However, the power can be exercised a lone with recognised line and not arbitrarily and the Court must keep in mind that the power shall not be exercised unless substantial injustice has ensued or is likely to ensue and in other cases the parties must be relegated to the courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense.

Constitution Bench of the Supreme Court, in Union of India and Ors. v. T.R. Verma MANU/SC/0121/1957 : AIR 1957 SC 882, held that it is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. The Supreme Court held that existence of an another remedy does not affect the jurisdiction of the Court to issue a writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such remedy is exhausted, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution unless there are good grounds therefor.

Constitution Bench of the Supreme Court in State of U.P. and Ors. v. Mohammad Nooh AIR 1958 SC

86, considered the scope of exercise of writ jurisdiction when remedy of appeal was there and held that writ would lie provided there is no other equally effective remedy. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of fundamental principles of justice. Therefore, in a proper case, powers of writ can be exercised, but should not be exercised generally where other adequate legal remedy is available though it may not be, per se, a bar to issue a writ of prerogative. The Supreme Court held that the remedy, being discretionary, cannot be asked as a matter of right, even if the order is a nullity, on the ground that it was passed by disregarding the rules of natural justice. The Court held as under: ".....save in exceptional cases, the courts will not interfere under Article 226 until all normal remedies available to a petitioner have been exhausted. The normal remedies in a case of this kind are appeal or revision. It is true that on a matter of jurisdiction or on a question that goes to the root of the case, the High Courts can entertain a petition at an early stage but they are not bound to do so and a petition would not be thrown out because the petitioner had done that which the Courts usually ask him to do, namely, to exhaust his normal remedies before invoking an extraordinary

jurisdiction.....The petitioner would have been expected to pursue the remedies of appeal or revision and could not have come to the High Court in the ordinary way until he had exhausted them."

In NT. Veluswami Thevar v. G. Taja Nainar and Ors.

AIR 1959 SC 442, the Supreme Court held that the jurisdiction of the High Court to issue writs against the Orders of the Tribunal is undoubted; but then, it is well settled that where there is another remedy provided, the Court must properly exercise its discretion in declining to interfere under Article 226 of the Constitution.

Constitution Bench of the Supreme Court, in State of Madhya Pradesh and Anr. v. Bhailal Bhai etc.

etc. MANU/SC/0029/1964 : [1964]6SCR261 , held that the remedy provided in a writ jurisdiction is not intended to supersede completely the mode of obtaining relief by an action in a civil court or to a deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in *Municipal Board, Khurai and Anr. v. Kamal Kumar and Anr.* **MANU/SC/0227/1964 : [1965]2SCR653** .

In Siliguri Municipality v. Amalendu Das and Ors.

MANU/SC/0017/1984 : AIR 1984 SC 653, the Supreme Court held that the High Court must

exercise its power under Article 226 with circumspection and while considering the matter of recovery of tax etc., it should not interfere save under very exceptional circumstances.

In S.T. Mathuswami v. K. Natarajan and Ors. MANU/SC/0426/1988 : [1988]2SCR759 , the Supreme Court held that the High Court cannot be justified to exercise the power in writ jurisdiction if an effective alternative remedy is available to the party.

In Kerala State Electricity Board and Anr. v. Kurien E. Kolathi and Ors. 2000 SCC 293, while dealing with a similar issue, the Supreme Court held that the writ petition should not be entertained unless the party exhausted the alternative/statutory efficacious remedy.

In A. Venkateshwarah Naidu v. S. Challappa Ors. MANU/SC/0581/2000 : AIR 2000 SC 3032 , the Supreme Court deprecated the practice of exercising the writ jurisdiction when efficacious alternative remedy is available. The Court observed as under: "Though no hurdle can be put against the exercise of Constitutional powers of the High Court, it is a well recognised principle which gives judicial recognition that the High Court should direct the party to avail himself of such remedy, one or other, before he reasons to a Constitutional remedy."

In the State of Himachal Pradesh and Ors. v. Raja Mahendra Pal and Ors. MANU/SC/0227/1999 : [1999] 2 SCR 323 while dealing with a similar issue the Supreme Court has held as under:- "It is true that the powers conferred upon the High Court under Article 226 of the Constitution are discretionary in nature and can be invoked for the enforcement of any fundamental right or legal right. The constitutional Court should insist upon the party (to avail of the efficacious alternative remedy) instead of invoking the extraordinary writ jurisdiction of the Court. This does not however debar the court from granting the appropriate relief to a citizen in peculiar and special facts notwithstanding the existence of alternative efficacious remedy. The existence of special circumstances are required to be noticed before issuance of the direction by the High Court while invoking the jurisdiction under the said Article."

In Govt., of A.P. and Ors. v. Sridevi and Ors. MANU/SC/0320/2002 : [2002] 2 SCR 1147 the Supreme Court held that where an authority is competent to determine the issue," the High Court in a writ jurisdiction should have directed the authority only to take an appropriate decision. When the statutory authority is vested with the power to determine the question as to the applicability of the provisions of the Act, it is ordinarily desirable to leave the question to be decided by such authority. The aggrieved party can file appeal against the decision

within the frame work provided under the statute and the ultimate decision also could be challenged under judicial review, if permitted in law.

In the State of Bihar and Ors. v. Jain Plastics & Chemicals Ltd. MANU/SC/0731/2001 : AIR 2002 SC 206 the Supreme Court held that existence of alternative remedy does not affect the jurisdiction of the writ court but it could be a good ground for not entertaining the petition.

In Harbans Lal Sahnia v. Indian Oil Corporation Ltd. MANU/SC/1199/2002 : AIR 2003 SC 2120 , the Supreme Court held that the rule of exclusion of writ jurisdiction by availability of alterative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the writ seeks enforcement of any of the fundamental rights; where there is failure of principle of natural justice or where the orders or proceedings are wholly without jurisdiction or the virus of an Act is challenged. While deciding the said case, the Supreme Court placed reliance upon its earlier judgment in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. MANU/SC/0664/1998 : AIR 1999 SC 22 .

AGRICULTURAL INDEBTEDNESS

Vora Saiyedbhai Kadarbhai vs. Saiyed Intajam Hussen Sedumiya and Ors. AIR 1981 Guj 15 MANU/GJ/0277/1980 "Agricultural indebtedness"

did not, mean indebtedness arising out of debt incurred in connection with agricultural operations only - Acceptance of later concept would mean that an agriculturist might be an agricultural debtor in so far as he had incurred debts for purpose of his agricultural activities such as tillage of soil, purchase of a plough, purchase of a pair of bullocks, purchase of seeds or sinking of an irrigation well and might also be a non-agricultural debtor in so far as he had incurred debts for other absolutely non-agricultural purposes such as marriage of his children, construction of a house other than a farm house or purchase of cloth - Therefore, irrespective of purpose for which debt had been incurred, a debt was an agricultural debt if it had been incurred by a person who earned his livelihood from agriculture.

UNLESS COURT ORDER IS SET ASIDE IN PROPER FORUM - ITS BINDING NATURE EXPLAINED

Anita International and Ors. vs. Tungabadra Sugar Works Mazdoor Sangh and Ors.: MANU/SC/0725/2016 - (2016) 9 SCC 44As held by the Court in the Krishnadevi Malchand Kamathia case MANU/SC/0085/2011 : (2011) 3 SCC 363, that it is not open either to parties to a lis or to any third parties, to determine at their own, that an order

passed by a Court is valid or void. A party to the lis or a third party, who considers an order passed by a Court as void or non est, must approach a Court of competent jurisdiction, to have the said order set aside, on such grounds as may be available in law. However, till an order passed by a competent Court is set aside, as was also held by this Court in the Official Liquidator, Uttar Pradesh and Uttarakhand MANU/SC/0234/2013 : (2013) 4 SCC 381 and the Jehal Tanti MANU/SC/0419/2013 : (2013) 14 SCC 689 cases, the same would have the force of law, and any act/action carried out in violation thereof, would be liable to be set aside. We endorse the opinion expressed by this Court in the Jehal Tanti case MANU/SC/0419/2013 : (2013) 14 SCC 689. In the above case, an earlier order of a Court was found to be without jurisdiction after six years. In other words, an order passed by a Court having no jurisdiction, had subsisted for six years. This Court held, that the said order could not have been violated while it subsisted. And further, that the violation of the order, before it is set aside, is liable to entail punishment, for its disobedience. For us to conclude otherwise, may have disastrous consequences. In the above situation, every cantankerous and quarrelsome litigant would be entitled to canvass, that in his wisdom, the judicial order detrimental to his interests, was void, voidable, or patently erroneous. And based on such plea, to avoid or disregard or even disobey the same. This course can never be permitted.

JOINT PROPERTY AND SALE AGREEMENT

In Kartar Singh v. Harjinder Singh and Ors. MANU/SC/0158/1990 : (1990) 3 SCC 517, at paragraph-6, it has been held that: "As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated. We also do not see any difficulty in granting specific performance merely because the properties are scattered at different places. There is no law that the properties to be sold must be situated at one place. As regards the apportionment of consideration, since admittedly the Appellant and Respondent's sister each have half share in the properties, the consideration can easily be reduced by 50% which is what the First Appellate Court has rightly done."

In Sardar Singh v. Krishna Devi (Smt.) and Anr. MANU/SC/0102/1995 : (1994) 4 SCC 18, at paragraph-17, it has been held that: "In view of the finding that the Appellant had half share in the property contracted to be sold by Kartar Lal, his brother, the agreement of sale does not bind the Appellant. The decree for specific performance as

against Kartar Lal became final. Admittedly the Respondent and her husband are neighbours. The Appellant and his brother being coparceners or co-owners and the Appellant after getting the tenant ejected both the brothers started living in the house. As a prudent purchaser Joginder Nath ought to have made enquiries whether Kartar Lal had exclusive title to the property. Evidence of mutation of names in the Municipal Register establishes that the property was mutated in the joint names of the Appellant and Kartar Lal and was in joint possession and enjoyment. The courts below, therefore, have committed manifest error of law in exercising their discretion directing specific performance of the contract of the entire property. The house being divisible and the Appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice. Accordingly we hold that Joginder Nath having contracted to purchase the property, it must be referable only in respect of half the right, title and interest held by Kartar Lal, his vendor. The first Respondent being successor in interest, becomes entitled to the enforcement of the contract of the half share by specific performance. The decree of the trial court is confirmed only to the extent of half share in the aforestated property. The appeal is accordingly allowed and the decree of the High Court is set aside and that of the trial court is modified to the above

extent. The parties are directed to bear their own costs throughout."

In A. Abdul Rashid Khan (Dead) and Ors. v. P.A.K.A. Shahul Hamid and Ors. MANU/SC/2734/2000 :

(2000) 10 SCC 636, at paragraph-14, it has been held that: "Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property agreement, then, even if other co-sharer has not joined at least to the extent of his share, he is bound to execute, the sale deed. However, in the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. In the present case, it is not in dispute that the Appellants have 5/6 share in the property. So, the Plaintiffs suit for specific performance to the extent of this 5/6th share was rightly decreed by the High Court which requires no interference."

In Surinder Singh v. Kapoor Singh (Dead) Through L.Rs. and Ors. MANU/SC/0350/2005 : (2005) 5

SCC 142, at paragraphs- 3 and 20, it has been held that: "A Letters Patent Appeal filed by the Plaintiffs-Respondents herein against the said judgment and decree came to be allowed by a Division Bench of the High Court by reason of the impugned judgment

holding that as the property was owned by the Appellant and the said Tajinder Kaur in equal share, in view of Kartar Singh (supra), a decree for specific performance could be granted in favour of the Plaintiffs-Respondents herein in respect of the share of the Appellant subject to his right to apply for partition of the property for getting his share demarcated. As regard apportionment of the sale consideration, it was directed that the same would be reduced by 50% as the Appellant would only be entitled thereto. As regard the objection of the Appellant herein that no relief could be granted as the Plaintiffs-Respondents failed to mention Khasra Nos. 39/4 and 39/3/2 in the plaint, the Division Bench held that such omission was inadvertent. It was pointed out that such an objection was raised only at the time of argument whereupon the Plaintiffs filed an application for amendment of plaint. It was held: ...We are of the view that the trial court was not justified in dismissing the application on technical grounds. Decree was sought for the entire land i.e. 153 K 19M. Copies of the agreement as well as jamabandi for the relevant year were also attached with the plaint. Agreement as well as jamabandi clearly indicate that relief sought was with regard to the land measuring 153 K 19M which also includes Khasra Nos. 39/4 and 39/3/2. In this view of the matter, prayer of the Plaintiffs for amendment of the Plaintiff is allowed. Plaint would be deemed to have included Khasra Nos. 39/4 and 39/3/2 apart from other Khasra numbers

mentioned in the plaint. The Appellant furthermore misled the Plaintiffs-Respondents by representing that he had the requisite authority to enter into an agreement for sale on behalf of his sister, which was found to be incorrect. In this situation, we are of the view that the equity lies in favour of grant of decree for specific performance of the contract in respect of the share of the Appellant rather than refusing the same. In any event if the Appellant and/or his sister have claim as regard the arrears of rent, the same can be adjudicated upon by the appropriate court in an appropriate proceeding. We are, therefore, unable to accept the said contention of Mr. Talwar.

In Gajara Vishnu Gosavi v. Prakash Nanasaheb Kamble and Ors. MANU/SC/1697/2009 : (2009) 10 SCC 654, it has been held that: "Be that as it may, three courts have recorded the concurrent findings of fact that partition had never been given effect to in respect of the suit property. Therefore, Housabai could transfer her share. But the question does arise as to whether without partition by metes and bounds, she could put her vendee Anjirabai in possession.

In Kartar Singh v. Harjinder Singh MANU/SC/0158/1990 : (1990) 3 SCC 517 : AIR 1990 SC 854, Court held that where the shares are separable and a party enters into an agreement even for sale of share belonging to other co-sharer, a suit

for specific performance was maintainable at least for the share of the executor of the agreement, if not for the share of other co-sharers. It was further observed:

In Ramdas v. Sitabai and Ors. MANU/SC/0910/2009 : (2009) 7 SCC 444 : JT (2009) 8 SC 224 - placing reliance upon two earlier judgments of Court in *M.V.S. Manikayala Rao v. M. Narasimhaswami and Ors. MANU/SC/0363/1965 : AIR 1966 SC 470*; and *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh and Ors. MANU/SC/0089/1953 : AIR 1953 SC 487*, Court came to the conclusion that a purchaser of a coparcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. He has a right only to sue for partition of the property and ask for allotment of his share in the suit property.There is another aspect of the matter. An agricultural land belonging to the coparceners/co-sharers may be in their joint possession. The sale of undivided share by one co-sharer may be unlawful/illegal as various statutes put an embargo on fragmentation of holdings below the prescribed extent.Thus, in view of the above, the law emerges to the effect that in a given case an undivided share of a coparcener can be a subject matter of sale/transfer, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree

of a Court in a partition suit, or by settlement among the co-sharers.

**AUTHORITIES SHALL GIVE REASONS FOR THEIR
ORDERS DETERMINING RIGHTS AND
OBLIGATIONS OF INDIVIDUALS**

**Maya Devi (Dead) through Lrs. vs. Raj Kumari
Batra (Dead) through Lrs. and Ors. (2010) 9 SCC
486: MANU/SC/0731/2010**

13. The juristic basis underlying the requirement that Courts and indeed all such authorities, as exercise the power to determine the rights and obligations of individuals must give reasons in support of their orders has been examined in a long line of decisions rendered by this Court. In *Hindustan Times Limited v. Union of India and Ors.* MANU/SC/0016/1998 : 1998 (2) SCC 242 the need to give reasons has been held to arise out of the need to minimize chances of arbitrariness and induce clarity. In *Arun S/o Mahadeorao Damka v. Addl. Inspector General of Police and Anr.* MANU/SC/0053/1986 : 1986 (3) SCC 696 the recording of reasons in support of the order passed by the High Court has been held to inspire public confidence in administration of justice, and help the Apex Court to dispose of appeals filed against such orders. In *Union of India and Ors. v. Jai Prakash Singh and Anr.* MANU/SC/1165/2007 : 2007 (10) SCC 712, reasons were held to be live links between the mind of the decision maker and the controversy in

question as also the decision or conclusion arrived at. In *Secretary and Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity and Ors.* MANU/SC/0155/2010 : 2010 (3) SCC 732, reasons were held to be the heartbeat of every conclusion, apart from being an essential feature of the principles of natural justice, that ensure transparency and fairness, in the decision making process. In *Ram Phal v. State of Haryana and Ors.* MANU/SC/0137/2009 : 2009 (3) SCC 258, giving of satisfactory reasons was held to be a requirement arising out of an ordinary man's sense of justice and a healthy discipline for all those who exercise power over others. In *Director, Horticulture Punjab and Ors. v. Jagjivan Parshad* MANU/SC/7391/2008 : 2008 (5) SCC 539, the recording of reasons was held to be indicative of application of mind specially when the order is amenable to further avenues of challenge.

14. It is in the light of the above pronouncements unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi judicial functions. All that we may mention is that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has

to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

15. What then are the safeguards against an arbitrary exercise of power? The first and the most effective check against any such exercise is the well recognized legal principle that orders can be made only after due and proper application of mind. Application of mind brings reasonableness not only to the exercise of power but to the ultimate conclusion also. Application of mind in turn is best demonstrated by disclosure of the mind. And disclosure is best demonstrated by recording reasons in support of the order or conclusion.

16. Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine

the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate Court should remit the matter is discretionary with the appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate Court is of the view that it will prolong the litigation.

PRESUMPTION OF OFFICIALS ACT

In the Accountant General v. S. Doraiswamy, MANU/SC/0407/1980 : AIR 1981 SC 783 : (1981 Lab IC 184) the Hon'ble Supreme Court observed that there was a presumption of non-abuse of power when it was vested in the high ranking officer, However, this view stood diluted with the passage of time and change in the moral values of the society.

In R.S. Dass v. Union of India, MANU/SC/0482/1986 : AIR 1987 SC 593 : (1987 Lab IC 476) the Hon'ble Supreme Court, in a similar situation, made the following observations (at page 598 of AIR) :-- "It cannot be said, now-a-days, if one is aware of the facts and currents of life that simply because categorisation and judgment of service record of the officer are in the hands of senior officers, is a

sufficient safeguard. There has been considerable erosion in the intrinsic sense of fairness and Justice in the senior officers by all concern. From the instances of conduct of many, some of the Senior Officers and men in high position, it cannot be said that such erosion is not only unjustified."

Hon'ble Supreme Court in Delhi Transport Corporation v. D. T. C. Mazdoor Congress, MANU/SC/0031/1991 : AIR 1991 SC 101 :

observed as under (at page 173 of AIR) :-- "It is trite to say that the individuals are not and do not become wise because they occupy high seat of power and good sense, circumspection and fairness, does not go with the posts however high they may be. There is only a complasant presumption that those who occupy high post, have high sense of responsibility. The presumption is neither legal nor rational. History does not support and reality does not warrant it."

Undoubtedly, the law does not acknowledge and recognise such a presumption. No doubt, u/Section 114, illustration (e) of the Evidence Act, there is a presumption been that official acts have regularly been performed, but the presumption is rebuttable. The law presumes and the Court must also presume until the contrary is established that the official acts will be done fairly and objectively as the authorities under the Statute are presumed to, and expected to, act consistent with the public interest and the interest

of law. (Vide State through Anti-Corruption Bureau, Government of Maharashtra v. Krishanchand Khushalchand Jagtiani, MANU/SC/0476/1996 : AIR 1996 SC 1910 : (1996 Cri LJ 2510); Shiv Sagar Tiwari v. Union of India, MANU/SC/0739/1997 : AIR 1997 SC 2725; and State of Bihar v. Subhash Singh, MANU/SC/0325/1997 : AIR 1997 SC 1390.

BREACH OF STATUTORY RIGHT - WRIT REMEDY

A writ petition under Article 226 of the Constitution is maintainable for enforcing the statutory right or when there is a complaint by the petitioner that there is a breach of statutory duty on the part of the respondent and the same has adversely affected the petition. Therefore, there must be judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on such writ jurisdiction. (State of Kerala vs. K.G. Madhavan Pillai MANU/SC/0479/1988 : AIR 1989 SC 49, State of Kerala vs. A Lakshmikutty & Ors. MANU/SC/0126/1986 : 1987 SC 331, Mani Subrat Jain and others vs. State of Haryana & Ors. MANU/SC/0540/1976 : AIR 1977 SC 276, Calcutta Gas Company (Proprietary) Ltd. vs. State of West Bengal and others MANU/SC/0063/1962 : AIR 1962

SC 1044, and Smt. Rampati Jaiswal vs. State of Uttar Pradesh and others MANU/UP/0025/1997 : AIR 1997 Allahabad 170.

In Rajendra Singh vs. State of Madhya Pradesh and others MANU/SC/0690/1996 : AIR 1996 SC 2736, the Apex Court held that mere violation of each and every provision of law does not furnish a ground for the High Court to interfere in its jurisdiction under Article 226 of the Constitution of India. In most of the cases, substantial compliance of law would be enough and unless it is established that violation of law has caused substantial prejudice to the petitioner, no interference is warranted.

No word in a Statute has to be construed as surplusage. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the Statute. By construction, a provision should not be reduced as a "dead letter" or "useless lumber. An interpretation which renders a provision an exercise in futility, should be avoided, otherwise it would mean that enacting such a provision in subordinate legislation was "an exercise in futility" and the product came as a "purposeless piece" of legislation and provision had been enacted without any purpose and entire exercise to enact such

a provision was "most unwarranted besides being uncharitable." (Vide M.V. Elisabeth and others vs. Harwan Investment and Trading Pvt. Ltd. MANU/SC/0685/1993 : AIR 1993 SC 1014, and Institute of Chartered Accountants of India vs. Price Water-house & Anr. MANU/SC/1233/1997 : 1997 (6) SCC 312, Martin Burn Ltd. vs. Corporation of Calcutta MANU/SC/0281/1965 : AIR 1966 SC 529, Patel Chunibhai Dejbhai vs. Narayanrao K. Jambekar & Anr. MANU/SC/0287/1964 : AIR 1965 SC 1457, Sultana Begum vs. Prem Chand Jain MANU/SC/0227/1997 : 1997 (1) SCC 373, State of Bihar vs. Bihar Distillery Ltd. and others MANU/SC/0354/1997 : AIR 1997 SC 1511, South Central Railway Employees Co-operative Credit Society Employees' Union, Secunderabad vs. Registrar of Co-operative Societies & Ors. MANU/SC/0028/1998 : 1998 (2) SCC 580, and Subash Chandra Sharma vs. State of Punjab & Ors. MANU/SC/0383/1999 : 1999 (5) SCC 171.

The language of the Act is very clear and it does not require any interpretation because there is no ambiguity in it. In case the language of a Statute is unambiguous, there can be no need to interpret it or examine the intent or object of the Act and the Courts must give effect to it unless it leads to an absurdity or injustice. It is well recognised canon of interpretation that provision curbing the jurisdiction of the Court or Authority must normally receive strict interpretation

unless the statute or the context requires otherwise. (Vide Abdul Waheed Khan vs. Bhawani MANU/SC/0266/1966 : AIR 1966 SC 1718, Sachida Nand Singh vs. State of Bihar MANU/SC/0077/1998 : 1998 (2) SCC 493, Jagdish Ch. Patnaik vs. State of Orissa MANU/SC/0277/1998 : 1998 (4) SCC 456, and Arul Nadar vs. Authorised Officer, Land Reforms MANU/SC/1135/1998 : 1998 (7) SCC 157.

When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto an uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. (Vide Taylor vs. Taylor 1876 (1) Ch. D. 426, Nazir Ahmed vs. King Emperor MANU/PR/0111/1936 : AIR 1936 PC 253, Deep Chand vs. State of Rajasthan MANU/SC/0118/1961 : AIR 1961 SC 1527, Patna Improvement Trust vs. Smt. Lakshmi Devi MANU/SC/0389/1962 : AIR 1963 SC 1077, State of Uttar Pradesh vs. Singhara Singh & Ors MANU/SC/0082/1963 : AIR 1964 SC 358, Nika Ram vs. State of Himachal Pradesh MANU/SC/0193/1972 : AIR 1972 SC 2077, Ramchandra Keshav Adke vs. Govind Joti Chavare & Ors MANU/SC/0511/1975 : AIR 1975 SC 915, Chettiam Veetil Ammad vs. Taluk Land Board & Ors. MANU/SC/0405/1979 : AIR 1979

SC 1573, State of Bihar vs. J.A.C. Saldanna AIR 1980 SC 327, A.K. Roy & Anr. vs. State of Punjab & Ors. MANU/SC/0156/1986 : 1986 (4) SCC 326, State of Mizoram vs. Biakchhawana MANU/SC/0522/1995 : 1995 (1) SCC 156, J.N. Ganatra vs. Morvi Municipality Morvi MANU/SC/0635/1996 : AIR 1996 SC 2520, Babu Verghese & Ors vs. Bar Council of Kerala & Ors MANU/SC/0168/1999 : 1999 (3) SCC 422, and Chandra Kishore Jha vs. Mahavir Prasad MANU/SC/0594/1999 : JT 1999 (7) SC 256.

RIGHT OF APPEAL

In Vijay Prakash D. Mehta and Jawahar D. Mehta v. Collector of Customs (Preventive). Bombay. MANU/SC/0570/1988 : AIR 1988 SC 2010, the Hon'ble Apex Court held as under:-- "Right to appeal is neither an absolute right nor an Ingredient of natural justice, the principles of which must be followed in all judicial or quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant..... The purpose of the section is to act in terrorem to make the people comply with the provisions of law."

Hon'ble Apex Court **in Anant Mills Co. Ltd. v. State of Gujarat. MANU/SC/0381/1975 : AIR 1975 SC 1234**; and Shyam Kishore v. Municipal Corporation of Delhi, MANU/SC/0440/1992 : **AIR 1992 SC 2279**,

In *Shyam Kishore (supra)* the Hon'ble Supreme Court placed reliance upon its earlier judgment in *Nandlal v. State of Haryana*, MANU/SC/0085/1980 : **AIR 1980 SC 2097**, wherein it has been held that "right of appeal is a creature of statute and there is no reason why the legislature, while granting the right, cannot impose conditions for the exercise of such right so long as the conditions are not soonerous as to amount to unreasonable restrictions rendering the right almost Illusory", the Court cannot interfere.

In Gujarat Agro Industries Co. Ltd. v. Municipal Corporation of the City of Ahmedabad, MANU/SC/0300/1999 : (1999) 4 SCC 468 : **(AIR 1999 SC 1818)** the Apex Court held that right of appeal though statutory, can be conditional/ qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided under the statute and when a law authorises filing of an appeal, it can impose conditions as well.

In Hoosein Kasam Dada (India) Ltd. v. State of M.P., MANU/SC/0075/1953 : **AIR 1953 SC 221** the Apex Court held that a vested right of appeal cannot be taken away except by express enactment or necessary intendment. An Intention to interfere with or to impair or imperial such a vested right cannot be

presumed unless such intention is clearly manifested by express words or necessary implication.

Constitution Bench of the Supreme Court, in Garikapati Veeraya v. N. Subbiah Choudhry, MANU/SC/0008/1957 : AIR 1957 SC 540 held that the right of appeal is a substantive right and is not a mere matter of procedure and such a vested right can be taken away only by a subsequent enactment and not otherwise.

In State of Bombay v. Supreme General Films Exchange Ltd., MANU/SC/0007/1960 : AIR 1960 SC 980 the Apex Court held that an impairment of the right of an appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure as it impairs a substantive right.

In Hindustan Commercial Bank Ltd. v. Punnu Sahu, MANU/SC/0015/1969 : AIR 1970 SC 1384 the Apex Court held that in the context of the Code of Civil Procedure, 1908 the expression "entertain" means "adjudicate upon" or "proceed to consider on merit." Thus, in such a case, an appeal or revision may be entertained, but the Court may not be able to decide it on merit owing to some difficulty, not in Jurisdiction but in procedure.

In Martin and Harris Ltd. v. Vith Additional District Judge, MANU/SC/0901/1998 : AIR 1998

SC 492 while interpreting the provisions of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 the Supreme Court held that the word "entertain" means "admit for consideration." Similar view had been reiterated in *Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner (Judicial), Sales Tax*, MANU/SC/0309/1967 : AIR 1968 SC 488. In *Anandilal Bhanwarlal v. Smt. Kasturi Devi Generiwala*, MANU/SC/0302/1984 : AIR 1985 SC 376; the word "institute" was found to be synonymous with the word "entertain."

In Lala Ram v. Hari Ram, MANU/SC/0115/1969 : AIR 1970 SC 1093 the Apex Court held that in the context of Section 417(3) of the Code of Criminal Procedure, the word "entertain" means 'file or receive by the High Court' and It has no reference to actual hearing of the application for leave to appeal.

In Rajasthan State Road Transport Corporation v. Santosh MANU/RH/0002/1995 : AIR 1995 Raj 2 Court, in the context of motor accident claims appeal, held that mere filing of an appeal and stay application by the applicant under Section 173 of the Motor Vehicles Act, 1988 will not be entertained by the Court unless the mandatory provisions contemplated in the aforesaid section are complied with.

In Thakur Sukhpal Singh vs. Thakur Kalyan Singh & Ors. MANU/SC/0015/1962 : AIR 1963 SC 146,

the Supreme Court held that the provisions of R. 31 of O. 41 CPC should be reasonably construed and should be held to require the various particulars mentioned u/R. 31 to take into consideration. - Order 41, R. 31 CPC provides that the judgment of the Appellate Court shall be in writing and shall state: (a) the point for determination, (b) the decision thereon, (c) the reason for the decision; (d) where the decree under appeal is reversed or varied, the relief to which the appellant is entitled; and shall, at the time of pronouncement, be signed and dated by the Judge or by the Judges concurring therein.

In Girijanandini Devi vs. Bijendra Narain Choudhary MANU/SC/0287/1966 : AIR 1967 SC 1124, the Hon'ble Apex Court has observed that when the Appellate Court agrees with the view of the trial Court in evidence, it did not re-state the effect of evidence or reiterate reasons given by the trial Court. The expression of general agreement with reasons given by the Court's decision, of which is under appeal, would ordinarily be suffice.

In Balaji Mohaprabhu & Anr. vs. Narasingha Kar and Ors. MANU/OR/0055/1978 : AIR 1978 Orissa 199, the Orissa High Court held that it would amount to substantial compliance of the provisions of O. 41, R. 31 CPC if the Appellate Court's judgment is based on independent assessment of the relevant evidence on all important aspects of the matter and the findings

by the Appellate Court are well-founded and quite convincing.

In Nihal Chand Agrawal vs. Gopal Sahai Bhartiya & Ors. MANU/DE/0542/1986 : AIR 1987 Del. 206 the Delhi High Court held that u/O. 41 R. 31 of the Code of Civil Procedure, it is mandatory upon the Appellate Court to independently weight the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. As the first appellate Court is the final Court of facts, it must not record a mere general expression of concurrence with the trial Court's judgment. Similar view has been expressed in *Bogamal Gohain & Ors. vs. Lakhinath Kalita & Ors.* MANU/GH/0025/1991 : AIR 1991 Gauhati 100.

In Samir Kumar Chatterjee vs. Hirendra Nath Ghosh MANU/WB/0018/1992 : AIR 1992 Cal. 129, the Calcutta High Court held that the Court of first appeal should not merely endorse the findings of the trial Court. In order to meet the requirement of O. 41, R. 31 CPC, the Appellate Court must give reasons for its decision independently of that of the trial Court.

In Hindustan Steel Works Construction Ltd v. Hindustan Steel Works Construction Ltd. Employees Union, Hyderabad, MANU/SC/0234/1995 : AIR 1995 SC 1163 : 1997-III-LLJ (Suppl)-1224, the Hon'ble Supreme Court

considered the issue of absorption of the employees retrenched by the Construction Company after completion of the work under one unit and did not absorb all of them and transferred to another unit. In the said case, the Tribunal had held that since all the units of the company constitute one single establishment, the retrenchment was bad and the workmen were entitled to be absorbed in another unit. The matter was agitated before the single Judge of Andhra Pradesh High Court and the learned single Judge found that the establishment at one place is a separate establishment, may be under the same employer and each unit, being a separate undertaking, the provisions of the Act were not attracted and the workmen so retrenched were not entitled of absorption. The matter was taken before the Division Bench, which held that it was incumbent on the part of the employer company to absorb workmen sought to be retrenched for the reason that there was "functional integrity between the workmen at Vizag Unit and the units at Hyderabad. The service conditions of the workmen in all the units are similar. There is a unity of employment, control, administration and ownership and so there is a functional integrity which makes the company a single undertaking. If that be so, the conclusion which is irresistible is that the units at Hyderabad are not separate establishments but they are all components of one single establishment." The Hon'ble Supreme Court placed reliance upon its earlier judgments in

Management, Hindustan Steel v. Workmen MANU/SC/0276/1973 : AIR 1973 SC 878. Workmen of Straw Board Manufacturing Company Ltd. v. Straw Board Manufacturing Company Ltd. MANU/SC/0305/1974 : AIR 1974 SC 1132 : 1974-I-LLJ-499, and Isha Steel Treatment, Bombay v. Association of Engineering Works Bombay, MANU/SC/0640/1987 : AIR 1987 SC 1478 : 1987-I-LLJ-427, wherein it had been held that the matter should be decided after addressing the question "whether one unit has same componential calendar that closing of one leads to closing of other or that one cannot reasonably exist without the other. Functional integrity will assume an aided significance in a case of closure of a branch or unit." The fact of unity of ownership, supervision and control and some other common features do not and cannot justify a contrary conclusion; all the tests evolved in several decisions of the Court need not all be satisfied in a case as the same may merely serve as guidelines and in a case where the work is not of a perennial nature and it is completed, the establishment may come to an end at that place though establishment may be having work at another place and that the work must be of different nature or of the same, there may not be functional integrity between the several units or several construction works undertaken by the employer. In case the closure of one unit does not lead to the closure of other, it cannot be held that there is a proximity between several units/works undertaken by

the employer. In case an employer has different units throughout India or all over the world then each of the work of construction project undertaken by the employer represent distinct establishment and do not constitute units of a single establishment and the Court held that the units at Hyderabad were distinct establishments and once this was so, the workmen of the said units had no right to demand absorption in other units at Hyderabad or somewhere else.

SCOPE OF FRAMING BYELAW OR RULE MAKING

A Constitution Bench of the Hon'ble Supreme Court in Tahir Hussain v. District Board. Muzzafarnagar, MANU/SC/0159/1954 : AIR 1954 SC 630 while considering the provisions of U.P. District Boards Act, 1922, held that the provisions of Section 174 of the Act enabled the District Board to frame the bye-laws for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the area. Framing the bye-laws by the District Board for regulating the market or prohibiting a citizen from holding the market was beyond jurisdiction in face of provisions of Section 174 of the Act and it was held to be beyond its competence to frame such a bye-law.

In Sant Saranlal v. Parsuram Shah, MANU/SC/0036/1965 : AIR 1966 SC 1852 the Apex Court held that the enactment framed by the legislature, namely, Bihar Money-lenders Act, 1938, did not provide for fixing of upper limit for the loans remained outstanding at any particular time. The rule-making power of the Government cannot be extended for fixing of such a limit as the rule-making power was held to be limited to what was stated in the provisions of Section 27 of the Act and those clauses did not empower the State Government to prescribe the limit up to which the loans advanced by the money-lender would remain outstanding at any particular moment of time. The said rule was declared to be substantive ultra-vires.

In Sales Tax Officer, Ponkunnam v. K.I. Abraham AIR 1967 SC 1823 the Hon'ble Supreme Court examined the provisions of Central Sales Tax Act, 1956 and the Central Sales Tax (Kerala) Rules, 1957, and held that as the provisions of Section 8(4) of the Act did not prescribe time limit, within which the declaration was to be filled-up by registered dealers, the same could not have been provided by Rule 6 of the said Rules, 1957, for the reason that the Act did not confer power on the rule-making authority to make a rule prescribing limitation for making the declaration by a registered dealer. In absence of any limitation fixed by the legislature, the declaration was to be made within reasonable period, but as the rule-

making authority had exceeded its jurisdiction, the said rule was held to be ultra-vires of Section 8(4) of the Act. Similar view has been reiterated by the Apex Court in Collector of Customs and Excise, Cochin v. A.S. Bava. MANU/SC/0093/1967 : AIR 1968 SC 13

In Bharat Barrel and Drum Mfg. Co. Pvt. Ltd. v. Employees' State Insurance Corporation, MANU/SC/0502/1971 : AIR 1972 SC 1935 the Apex Court held that the provisions of Section 96(1)(b) of the Employees' State Insurance Act, 1948, did not confer the power on the Government to prescribe by rules a period of limitation for claim under Section 75 and Rule 17 framed by the Bombay Government under Section 75 of the Act prescribing limitation was ultra vires of Section 96(1)(b) being beyond competence of the State Government.

Prabhu Narayan v. A.K. Srivastava, MANU/SC/0295/1975 : AIR 1975 SC 968, the Apex Court struck down the provisions of Rule 9 of the Madhya Pradesh High Court Rules in respect of election petitions being ultra vires of provisions of Section 123 (4) of the Representation of People Act, 1951 holding that the rules framed under the Act cannot make any substantive law and the rules themselves, on a perusal, would show that they relate merely to procedural matters unlike the rules made under Section 122 of the Code of Civil Procedure.

In General Officer Commanding-in-Chief v. Dr. Subhash Chandra Yadav, MANU/SC/0165/1988 : AIR 1988 SC 876 the Supreme Court examined the provisions of Rule 5(c) of the Cantonment Board Servant Rules, 1937, framed under Section 280 of the Cantonment Act, 1924 and held it "to be void as being contrary to and in excess of the rule-making power of the Central Government" for the reason that unamended Act did not include the service conditions of an employee which may take the transfer of an employee within its ambit and, therefore, framing the rules for transfer was beyond the competence of the Central Government.

In Ahmedabad Urban Development Authority v. Sharadkumar Jayanti Kumar Paswalla, MANU/SC/0400/1992 : AIR 1992 SC 2038 the Apex Court held that for imposition of any liability under a fiscal statute, an express provision authorising such imposition is a condition precedent and it cannot be done by the delegated authority. The Court rejected the contention that such an imposition can be made under general statutory powers including the incidental, ancillary and consequential powers. The Court distinguished its earlier judgments in *Khargram Panchayat Samiti v. State of West Bengal*, (1987) 3 SCC 8 and *District Council of Jowai Autonomous District v. Dwest Singh Rymbal*, MANU/SC/0069/1986 : AIR 1986 SC 1930 wherein it had been held that in a statute, conferment of general

statutory power also carries with it the Incidental and consequential power.

In Agricultural Market Committee v. Shalimar Chemical Works Ltd., MANU/SC/0644/1997 : AIR 1997 SC 2502 the Apex Court held that in fiscal statute, the delegate cannot legislate on the field covered by the Act and it must restrict to implementation of the Policy. The Court struck down the bye-laws 24(5) and Rule 74(2) of the Andhra Pradesh (Agricultural Produce and Live-stock) Market Rules, 1969 framed under the Andhra Pradesh (Agricultural Produce and Live-stock) Markets Act, 1966 being beyond the competence of the Authority concerned.

In Vasantlal Maganbhai Sanjanwalav. State of Bombay, MANU/SC/0288/1960 : AIR 1961 SC 4 and the Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, MANU/SC/0175/1968 : AIR 1968 SC 1232, it was held that the legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and the objects of the Act concerned.

In Avinder Singh v. State of Punjab, MANU/SC/0299/1978 : AIR 1979 SC 321 the

Hon'ble Supreme Court laid down the following tests for valid delegation of legislative powers:--

- "(1) the legislature cannot efface itself;
- (2) It cannot delegate the plenary 'or the essential legislative functions;
- (3) even if there be delegation, Parliamentary control over delegated legislation should be a living continuity as a constitutional necessity."

It further observed as under:--

"While what constitutes an essential feature cannot be delineated in detail it certainly cannot include a change of policy. The legislature is the master of legislative policy" and if the delegate is free to switch policy it may be usurpation of legislative power it self."

The Constitution Bench of the Supreme Court in State of U.P. v. Babu Ram Upadhyaya, MANU/SC/0312/1960 : AIR 1961 SC 751 observed as under:-- ".... the rules cannot be treated as administrative directions, but shall have the same effect as the provisions of the Statute whereunder they are made, in so far as they are not Inconsistent with the provisions thereof."

Hon'ble Supreme Court in General Officer Commanding-in-Chief (MANU/SC/0165/1988 : AIR 1988 SC 876) and the Court held that it merely shows that the Rules were having statutory force, but before a rule framed under the statute is regarded as statutory provision or a part of the statute, it must

fulfil two conditions, namely, (I) it must conform to the provisions of the statute under which It is framed; and (ii) it must also come within the scope and purview of the rule-making power of the Authority framing the rule. If either of these two conditions is not fulfilled, the rule so framed would be void.

Sangram Singh vs. Election Tribunal, Kota
MANU/SC/0044/1955 : AIR 1955 SC 425, wherein the Court had observed that the procedural law has been designed to facilitate justice and too technical consideration of the Section that leave no room for reasonable elasticity of interpretation should, therefore, be guarded against as the same may frustrate the case of justice.

BURDEN OF PROOF

H.M.M. Ltd. vs. Director General, Monopolies and Restrictive Trade Practices Commission
MANU/SC/0503/1998 : (1998) 6 SCC 485, the Apex Court held that the party which makes an allegation, has to establish it for the reason that the burden of proving the same is on him and in case the said party has not done it, the Court has no option but to reject the case.

In J.P. Ravidas & Ors. vs. Navyuvakharijan
Utthapan Multi Unit Industrial Co-operative

Society Ltd. & Ors. MANU/SC/0539/1996 : (1996) 9 SCC 300, the Hon'ble Apex Court has categorically held that the first question, to which the Court has to address itself, is : whether the plaintiff has discharged the burden of proving the allegations made by him?

Kala & Anr. vs. Madho Prashad Vaidya MANU/SC/0571/1998 : (1998) 6 SCC 573, while deciding the controversy between the landlord and tenant regarding the subletting, the Apex Court held as under:- "The onus to prove sub-letting is on the landlord and if he establishes parting with the possession in favour of a third party, the onus would shift to the tenant to explain. In the instant case, however, the landlord did not discharge the initial onus and although it was not required, yet the tenant explained how appellant No. 2 had the permissive possession of the shop as its manager. On the established facts and circumstances of the case, the plea of sub-letting was not established."

In Moran Mar Basselios Catholicos & Anr. vs. Most. Rev. Mar Poulouse Atanasius & Ors. MANU/SC/0003/1954 : AIR 1954 SC 526, the Apex Court held that the plaintiff, in ejectment suit, must succeed on the strength of his own case and it must be proved by adducing sufficient evidence to discharge the onus that is on him, irrespective of : whether the defendant has proved his case or not. A mere destruction of the defendant's case in the absence of

establishment of his own case, carries the petitioner nowhere.

Constitution Bench of the Hon'ble Apex Court in Moran Mar Basselios Catholicos vs. Thukalan Paulo Avira & Ors. MANU/SC/0181/1958 : AIR 1959 SC 31, has held that in a suit if the plaintiffs are to succeed, they must do it on the strength of their own case and not on the weakness of the defendant's case.

In A. Raghavamma & Anr. vs. A. Chechamma & Anr. MANU/SC/0250/1963 : AIR 1964 SC 136, the Apex Court has explained the distinction between "burden of proof" and "onus to prove" observing as under:- "There is an essential distinction between burden of proof and onus to prove: burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case, no doubt, lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of the particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence..... It is well settled that a person, who seeks to displace the natural succession to property by alleging an adoption, must discharge the burden that

lies upon him by proof of factum of adoption and its validity."

In Kalwa Devadattam & Ors. vs. Union of India &, Ors. MANU/SC/0106/1963 : AIR 1964 SC 880, the Apex Court has observed as under :- "The question of onus probandi is certainly important in the early stages of a case. It may also assume importance where no evidence, at all, is led on the question in dispute by either side; in such a contingency, the party on whom the onus lies to prove a certain fact, must fail. Wherever, however, evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place, truth or otherwise of the case must always be adjudged on the evidence led by the parties."

It is settled proposition of law that burden of proof always lies upon the party who makes certain allegations and seeks relief on it. The Court has to address itself, whether the party, which has made the allegations, has discharged the burden of proving the allegations. Moreso, the party must succeed on the strength of its own case rather than on the weakness of the case of the other side. Such party is under a legal obligation to prove its case irrespective of the fact whether the opposite party has proved its case or not. "A mere destruction of the case of the defendant in absence of establishment of his own case, carries the petitioner nowhere." (Vide J.P. Ravidas v. Navyuvak

Harijan Uthapan Multi Unit Industrial Co-op. Society Ltd., MANU/SC/0539/1996 : AIR 1996 SC 2151 : 1996 (9) SCC 300; H.M.M. Ltd. v. Director General, Monopolies and Restrictive Trade Practices Commission, MANU/SC/0503/1998 : AIR 1998 SC 2691 : 1998 (6) SCC 485 ; Kala v. Madho Parshad Vaidya, MANU/SC/0571/1998 : AIR 1998 SC 2773 : 1998 (6) SCC 573; Moran Mar Basseliou Catholicos v. Most Rev. Mar Poulouse Athanasius, AIR 1954 SC 526; and Moran Mar Basselios Catholicos v. Thukalan Paulo Avira, AIR 1959 SC 31.

In State of Rajasthan v. Nand Lal, 1993 Suppl (1) SCC 681, the Hon'ble Supreme Court held as under: "What we wish to emphasise is that the allegations made by each of the petitioners has to be established by him But this allegation cannot be read to mean that the State is under an obligation to establish or make out the writ petitioner's case. The burden lies upon the petitioner, who seeks a particular relief on the basis of certain facts, to establish those facts."

INTERPRETATION OF STATUTE

Dwarka Nath v. Income Tax Officer, MANU/SC/0166/1965 : AIR 1966 SC 81, the Hon'ble Supreme Court placed reliance upon its earlier judgments of the Constitution Bench in T. C. Basappa v. T. Nagappa, MANU/SC/0098/1954 : AIR 1954 SC 440 and P. J. Irani v. State of Madras, MANU/SC/0080/1961 : AIR 1961 SC 1731 and

observed as under :-- "This Article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of power, the purpose for which and the person or Authority against whom it can be exercised."

No word in a Statute has to be construed as surplusage. No word can be rendered ineffective or purposeless. Courts are required to carry out the legislative intent fully and completely. While construing a provision, full effect is to be given to the language used therein, giving reference to the context and other provisions of the Statute. By construction, a provision should not be reduced as a "dead letter" or "useless lumber. An interpretation which renders a provision an exercise in futility, should be avoided, otherwise it would mean that enacting such a provision in subordinate legislation was "an exercise in futility" and the product came as a "purposeless piece" of legislation and provision had been enacted without any purpose and entire exercise to enact such a provision was "most unwarranted besides being uncharitable." (Vide M.V. Elisabeth v. Harwan Investment and Trading Pvt. Ltd., MANU/SC/0685/1993 : Institute of Chartered Accountants of India v. Price Water-house, MANU/SC/1233/1997 : (1997) 6 SCC 312 : (AIR 1998 SC 74) Martin Burn Ltd. v. Corporation of Calcutta,

MANU/SC/0281/1965 : Patel Chunibhai Dejibhai v. Narayanrao K. Jambekar MANU/SC/0287/1964 : Sultana Begum v. Prem Chand Jain, MANU/SC/0227/1997 : (1997) 1 SCC 373 : (AIR 1997 SC 1006), State of Bihar v. Bihar Distillery Ltd. MANU/SC/0354/1997; South Central Railway Employees Co-operative Credit Society Employees' Union, Secunderabad v. Registrar of Co-operative Societies; MANU/SC/0028/1998 : (1998) 2 SCC 580 : (AIR, 1998 SC 703); and Subash Chander Sharma v. State of Punjab, MANU/SC/0383/1999 : (1999) 5 SCC 171 : (AIR 1999 SC 2076).

The language of the Act is very clear and it does not require any interpretation because there is no ambiguity in it. In case the language of a Statute is unambiguous, there can be no need to interpret it or examine the intent or object of the Act and the Courts must give effect to it unless it leads to an absurdity or injustice. It is well recognised canon of interpretation that provision curbing the jurisdiction of the Court or Authority must normally receive strict interpretation unless the statute or the context requires otherwise. (Vide Abdul Waheed Khan v. Bhawani MANU/SC/0266/1966; Sachida Nand Singh v. State of Bihar, MANU/SC/0077/1998; Jagdish Ch. Patnaik v. State of Orissa MANU/SC/0277/1998; and Arul Nadar v. Authorised Officer, Land Reforms MANU/SC/1135/1998;

In Rambul Singh v. Board of Revenue for Rajasthan, MANU/RH/0008/1957 : AIR 1957 Raj. 19, Court held that when the language of the law admits of no ambiguity and is very clear, it is not open to the Courts to put their own gloss in order to squeeze out some meaning which is not borne out by the language of the law.

Full Bench of Court, in Jairam Das v. Regional Transport AIR 1957 Raj, 312, has held that "where the case falls within the plain meaning of the provision of law, its application thereto cannot be denied on any a priori consideration as to the supposed of the intention of the legislature, even though the Court may be satisfied that the legislature had not contemplated a particular consequence. While invoking a law, the Court is still bound to give effect to its clear language."

Constitution Bench of the Hon'ble Supreme Court, in Sales Tax Officer, Banaras v. Kanhaiya Lal Makund Lal Saraf, MANU/SC/0129/1958 : AIR 1959 SC 135, held that where the terms of provisions in the Statute are plain and unambiguous, the Courts should not resort to interpretation for the reason that there was no latent or patent ambiguity and the Courts were not required to find what was the true intendment of the Legislature. In case the terms of the Statute do not admit of any ambiguity, it is a clear duty of the Courts to construe the plain terms of the

Statute and give them their legal effect. In this respect, the Court has got to turn to the very terms of the Statute itself, divorce from all considerations.

In Kanai Lal Sur v. Paramnidhi Sadhukhan, MANU/SC/0097/1957 : AIR 1957 SC 907, the Hon'ble Supreme Court observed as under :-- "If the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged policy and object of the Act."

In Manmohan Das Shah v. Bishun Das, MANU/SC/0248/1966 : AIR 1967 SC 643, the Hon'ble Supreme Court observed as under :-- "The ordinary rule of construction is that a provision of a Statute must be construed in accordance with the language used therein unless there are compelling reasons. Such as, where a literal construction would reduce the provision to absurdity or prevent the manifest intention of the legislature from being carried out. There is no reason why the word "or" should be construed otherwise than in its ordinary meaning. If the construction suggested by Mr. Desai were to be accepted and the word "or" were to be construed as meaning "and", it would mean that the construction should not only be such as materially alters the accommodation but is also such that it would substantially diminish its value. It seems to

us that the legislature intended to provide for both the contingencies.:....."

In Kamta Prasad Aggarwal v. Executive Engineer, Ballabgarh, MANU/SC/0467/1973 : AIR 1974 SC 685, the Apex Court held that "depending upon the context, "or" may be read as "and" but the Court would not do it unless it is so obliged because "or" does not generally mean "and" and "and" does not generally mean "or".

In Hyderabad Asbestos Cement Products v. Union of India MANU/SC/0760/1999 : (2000) 1 SCC 426 : (AIR 2000 SC 314), the Court held as under :-- "The language of the rule is plain and simple. It does not admit of any doubt in interpretation. Provisos 1(i) and 2(i) are separated by the use of conjunction "and". They have to be read conjointly. The requirement of both the provisos has to be satisfied to avail the benefit."

In Hakim Ali v. Board of Revenue, MANU/SC/0223/1991 : AIR 1991 SC 972, the Hon'ble Supreme Court, while confronted with a similar problem, observed as under :-- "It is no doubt, true that as a general rule, legislature may be presumed not to make a superfluous provision. But this presumption is not a strong presumption and it is not uncommon to find the legislature inserting

superfluous provision under the influence of what may be abundant caution."

State of Maharashtra v. Nanded-Parbhani Z. L. B. M. V. Operator Sangh, MANU/SC/0034/2000 : (2000) 2 SCC 69 : (AIR 2000 SC 725), the Apex Court held that "if the language of the Statute is fairly and reasonably clear then inconvenience and hardship are no consideration for refusing to give effect to that meaning unless giving effect to the plain meaning of the words used in the Statute leads to an absurdity or would make the Statute offend any provision of the Constitution. Thus, the intention of the legislature is required to be gathered from the language used and, therefore, a construction which requires for its support and additional substitution of the word and which results in rejection of the word as meaningless, has to be avoided."

In Mool Chand v. Kedar MANU/SC/0051/2000, the Hon'ble, Supreme Court has categorically held that the basic rule of interpretation of the Statute is that in order to find out the determination of the legislative intent, if the language of the Statute is plain and simple, it must be considered literally and paradoxical results must be accepted.

In Raees Ahmad v. State of U.P. MANU/SC/0772/1999 : (2000) 1 SCC 432 : (AIR 2000 SC 583), the Hon'ble Supreme Court had to

interpret the provisions of U.P. Municipalities Act, 1916, regarding computation of 2/3 of the total number of members for the purpose of carrying out the No Confidence Motion against the Chairman of the Municipal Board. The question arose : whether the nominated members, for that purpose, have to be taken into account or not, for the reason that under the provisions of Section 9(d) of the Act, a nominated member had no right to vote in the meeting of the Municipality, therefore, the contention was raised that even in the No Confidence Motion, they cannot be counted for determining 2/3 of the votes requisite for passing the Motion of No Confidence. The Hon'ble Court rejected the contention observing as under :-- "We find it difficult to accept the submission, given the plain words of the provisions quoted above. That nominated members may not vote does not imply that they cease to be the members of the Municipality or that their number should be ignored in determining whether the President has lost the confidence of two-third of the members."

It is a settled legal proposition that hardship of an individual cannot be a ground to strike down a statutory provision for the reason that a result flowing from a statutory provision is never an evil. It is the duty of the court to give full effect to the statutory provisions under all circumstances. Merely because a person suffers from hardship cannot be a ground for not giving effective and grammatical meaning to every

word of the provisions if the language used therein is unequivocal. (See: *The Martin Burn Ltd. v. The Corporation of Calcutta* MANU/SC/0281/1965 : AIR 1966 SC 529; *Tata Power Co. Ltd. v. Reliance Energy Limited and Ors.* MANU/SC/1991/2009 : (2009) 16 SCC 659; and *Rohitash Kumar and Ors. v. Om Prakash Sharma and Ors.* MANU/SC/0936/2012 : AIR 2013 SC 30).

RULES OR REGULATIONS BINDING ON AUTHORITIES

In Sirsi Municipality v. Cecelia Kom Francis Tellis MANU/SC/0066/1973 : (1973)ILLJ226SC , the Supreme Court observed that "the ratio is that the rules or the regulations are binding on the authorities."

Constitution Bench of the Hon'ble Supreme Court, in Sukhdeo Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr. MANU/SC/0667/1975 : (1975)ILLJ399SC , has observed as under: The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by Courts to invalidate actions in violation of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration

give the employees a statutory status and impose restrictions on the employer and the employee with no option to vary the conditions.... In cases of statutory bodies there is no personal element whatsoever because of the impersonal character of statutory bodies... the element of public employment or service and the support of statute require observance of rules and regulations. Failure to observe requirements by statutory bodies is enforced by courts by declaring (action) in violation of rules and regulations to be void. This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute."

Similar view has been taken by the Supreme Court in Ambica Quarry Works etc. v. State of Gujarat and Ors. MANU/SC/0853/1988 : [1987]1SCR562 and Commissioner of Police v. Gordhan MANU/SC/0002/1951 : [1952]1SCR135 . In both the cases, the Apex Court relied upon the judgment of the House of Lord in Julius v. Lord Bishop of Oxford 1880 5 AC 214, wherein it was observed as under: There may be something in the nature of thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be

exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. In Commissioner of Police (supra), the Apex Court observed as under: Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order.... An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded, performance of it can be compelled.

In Dr. Meera Massey v. Dr. S.R. Mehrotra and Ors. MANU/SC/0084/1998 : [1998]1SCR470 , the Apex Court observed as under: If the laws and principles are eroded by such institutions, it not only pollutes its functioning deteriorating its standard but also exhibits...wrong channel adopted.... If there is any erosion or descending by those who control the activities all expectations and hopes are destroyed. If the institutions perform dedicated and sincere service with the highest morality it would not only up lift many but bring back even a limping society to its normally.

The Supreme Court has taken the same view in Ram Chand and Ors. v. Union of India and Ors. MANU/SC/0559/1994 : (1994)1SCC44 , and held that the exercise of power should not be made against the spirit of the provisions of the statute, otherwise it would tend towards arbitrariness."

In Purushottam v. Chairman, Maharashtra State Electricity Board and Anr. 1996 6 SCC 49, the Hon'ble Supreme Court has held that appointment should be made strictly in accordance with the statutory provisions and a candidate who is entitled for appointment, should not be denied the same on any pretext whatsoever as usurpation of the post by somebody else in any circumstance is not possible.

Constitution Bench of the Hon'ble Supreme Court, in Ajit Singh (II) v. State of Punjab and Ors. MANU/SC/0575/1999 : AIR1999SC3471 , has observed as under: Article 14 and Article 16(1) are closely connected. They deal with the individual rights of the persons. Article 14 demands that 'State shall not deny to any person equality before the law or the equal protection of few." Article 16(1) issues a positive command that 'there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.' It has been held repeatedly by this Court that Clause (1) of Article 16 is a facet of Article 14 that it takes its roots from Article 14. The said Clause particularises the

generality in Article 14 and identifies, in a Constitutional Sense 'equality of opportunity' in matter of employment and appointment to any office under the State.... The right to equal opportunity in the matter of promotion in the sense of a right to be 'considered' for promotion is, in deed, a fundamental right guaranteed under Article 16(1) and this has never been doubted in any case before Ashok Kumar Gupta v. State of UP. MANU/SC/1176/1997 : [1997]3SCR269 right from 1950. Thus, the right of consideration for appointment/promotion is not merely a statutory right but is a fundamental right.

In Indra Sawhni v. Union of India and Ors. MANU/SC/0771/1999 : AIR 2000 SC 498 , the Hon'ble Supreme Court reiterated the law laid down by it time and again that Articles 14 and 16(1) of the Constitution of India provide for rule of equality which is the basic feature of the Constitution and, therefore, there can be no deviation from the principles enshrined therein while making the appointments. Rule of equality is an antithesis of any kind of arbitrariness or private gain, whim or caprice of any individual. Even if the State has the discretionary power to issue executive instructions, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also 'satisfy the mandatory requirement of the Statute." (Vide A.P. Aggarwal v. Government (of N.C.T.) of Delhi and Ors. MANU/SC/0722/1999 :

AIR2000SC205 . In Kumari Srilekha Vidharthi etc. etc. v. State of U.P. and Ors. MANU/SC/0504/1991 : AIR1991SC537 , the Apex Court held that every State act, in order to survive, must not be susceptible to vice of arbitrariness which is a crux of Article 14 of the Constitution and basis to the rule of law.

The Hon'ble Apex Court has considered time and again the scope of issuing the executive orders. A Constitution Bench of the Hon'ble Supreme Court, in **B.N. Nagarajan v. State of Mysore** MANU/SC/0043/1966 : (1967)ILLJ698SC , has observed as under: It is hardly necessary to mention that if there is a statutory rule or an Act on the matter, the executive must abide by that Act or the Rules and it cannot, in exercise of its executive powers under Article 162 of the Constitution, ignore or act contrary to that Rule or the Act.

Constitution Bench of the Hon'ble Supreme Court in Sant Ram Sharma v. State of Rajasthan and Ors. MANU/SC/0330/1967 : (1968)ILLJ830SC , has observed as under: It is true that the Government cannot amend or supersede statutory Rules by administrative instruction, but if the Rules are silent on any particular point, the Government can fill-up the gap and supplement the rule and issue instructions not inconsistent with the Rules already framed."

The Constitution Bench of the Hon'ble Supreme Court, in Naga People' Movement of Human Rights v. Union of India and Ors. MANU/SC/0906/1998 : AIR1998SC465 , held that the executive instructions are binding provided the same have been issued to fill up the gap between the statutory provisions and are consistent with the said provisions.

In C. Rangaswamaiah and Ors. v. Karnataka Lokayukta and Ors. MANU/SC/0441/1998 : [1998]3SCR837 , the Hon'ble Supreme Court held that executive instructions can be passed even for creating the post so long as they remain consistent with law/rules.

In Nagpur Improvement Trust v. Yadaorao Jagannath Kumbhera, MANU/SC/0474/1999 : AIR1999SC3084 , the Hon'ble Supreme Court observed that in absence of statutory rules, appointments can be made on the basis of executive instructions but there is no scope of deviation of rules, if the same exist.

Thus, it is settled law that executive instructions cannot amend or supersede the statutory rules or add something therein. The orders cannot be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law; while statutory Rules

have full force of law as held by the Constitution Bench of the Hon'ble Supreme Court in State of U.P. and Ors. v. Babu Ram Upadhyaya MANU/SC/0312/1960 : 1961CriLJ773 ; and State of Tamil Nadu v. M/s. Hind Stone etc. MANU/SC/0394/1981 : [1981]2SCR742 .

In Union of India v. Sri Somesundram Vishwanath AIR 1988 SC 2255, the Hon'ble Apex Court has observed that if there is a conflict between the executive instruction and the Rules framed under the proviso to Article 309 of the Constitution, the Rules will prevail. Similarly, if there is a conflict in the rules made under the proviso to Article 309 of the Constitution and the law, the law will prevail.

In Ram Ganesh Tripathi v. State of U.P. MANU/SC/0341/1997 : AIR1997SC1446 , the Hon'ble Supreme Court considered a similar controversy and held that any executive instruction/order which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed, being dehors the rules. The Court observed as under: They (respondents) relied upon the order passed by the State. This order also deserves to be quashed as it is not consistent with the statutory rules. It appears to have been passed by the Government to oblige the respondents and similarly situated ad hoc appointees.

CONCEPT OF HEARING

Constitution Bench judgment of this Court in Gullapalli Nageswara Rao & Ors. v. Andhra Pradesh State Road Transport Corporation & Anr., AIR 1959 SC 308 wherein it has categorically been held that the Authority which hears the objectors must pass the order. In case an Authority hears the objectors and demits the office or stands transferred, his successor should hear the parties afresh and not giving the opportunity of fresh hearing by the successor officer would amount to failure of principles of natural justice and his order would stand vitiated.

FACTS OCCURED PENDING LITIGATION

Apex Court in "K.B. Ramachandra Raje v. State of Karnataka, reported as (2016) 3 SCC 422" which has categorically held as under:- "in granting relief at the end of a protracted litigation, as in the present case, the Court cannot be unmindful of facts and events that may have occurred during the pendency of the litigation. It may, at times, become necessary to balance the equities having regard to the fact situation and accordingly mould the relief(s). How the relief is to be moulded, in the light of all the relevant facts, essentially lies in the realm of the discretion of the courts whose ultimate duty is to uphold and further the mandate of law. It is submitted that, the court can

mould relief, if it is satisfied that, taking note of subsequent changes or changed circumstances would shorten litigation and enable complete justice being done to the parties."

DELAY CONDONATION

N. Balakrishnan v. M. Krishnamurthy reported at MANU/SC/0573/1998 : (1998) 7 SCC 123, more particularly, para 9, which we reproduce below, in support of his submission that condonation of delay is a matter of discretion wherein acceptability of the explanation is the only criterion. He further submits that the Supreme Court has repeatedly held that the Courts should take a liberal approach while deciding the applications under Section 5 of the Limitation Act. "9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of

discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

Brijesh Kumar and Ors. vs. State of Haryana and Ors. AIR 2014 SC 1612 : MANU/SC/0217/2014 -

The law of limitation is enshrined in the legal maxim "Interest Reipublicae Ut Sit Finis Litium" (it is for the general welfare that a period be put to litigation). Rules of Limitation are not meant to destroy the rights of the parties, rather the idea is that every legal remedy must be kept alive for a legislatively fixed period of time. It is also a well settled principle of law that if some person has taken a relief approaching the Court just or immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the court at a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.

The Privy Council in General Fire and Life Assurance Corporation Ltd. v. Janmahomed Abdul

Rahim MANU/PR/0002/1940 : AIR 1941 PC 6, relied upon the writings of Mr. Mitra in Tagore Law Lectures 1932 wherein it has been said that "a law of limitation and prescription may appear to operate harshly and unjustly in a particular case, but if the law provides for a limitation, it is to be enforced even at the risk of hardship to a particular party as the Judge cannot, on applicable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by law."

In P.K. Ramachandran v. State of Kerala and Anr. MANU/SC/1296/1997 : AIR 1998 SC 2276, the Apex Court while considering a case of condonation of delay of 565 days, wherein no explanation much less a reasonable or satisfactory explanation for condonation of delay had been given, held as under:- Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the Courts have no power to extend the period of limitation on equitable grounds.

Esha Bhattacharjee v. Raghunathpur Nafar Academy and Ors. MANU/SC/0932/2013 : (2013) 12 SCC 649 laid down various principles inter alia:.. Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant factThe concept of liberal approach has to encapsule the conception of reasonableness and it cannot be allowed a totally unfettered free play.....The conduct,

behavior and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.....The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters.

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation

by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

In State of Karnataka and Ors. v. S.M. Kotrayya and Ors. MANU/SC/1247/1996 : (1996) 6 SCC 267, this Court rejected the contention that a petition should be considered ignoring the delay and laches on the ground that he filed the petition just after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. The Court observed that such a plea is wholly unjustified and cannot furnish any ground for ignoring delay and laches.

Court in Jagdish Lal and Ors. v. State of Haryana and Ors. MANU/SC/0596/1997 : AIR 1997 SC 2366, observing as under:- Suffice it to state that Appellants kept sleeping over their rights for long and elected to wake-up when they had the impetus from Vir Pal Chauhan and Ajit Singh's ratios...Therefore desperate attempts of the Appellants to re-do the seniority, held by them in various cadre.... are not amenable to the judicial review at this belated stage.

The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well.

In M/s. Rup Diamonds and Ors. v. Union of India and Ors. MANU/SC/0358/1989 : AIR 1989 SC 674, this Court considered a case where Petitioner wanted to get the relief on the basis of the judgment of this Court wherein a particular law had been declared ultra vires. The Court rejected the petition on the ground of delay and laches observing as under:- There is one more ground which basically sets the present case apart. Petitioners are re-agitating claims which they have not pursued for several years. Petitioners were not vigilant but were content to be dormant and chose to sit on the fence till somebody else's case came to be decided.

In the case of Postmaster General and others v. Living Media India Limited and another reported in MANU/SC/0132/2012 : (2012) 3 SCC 563, after considering the earlier judgments on the issue of condonation of delay, the Apex Court declined to condone the delay in filing the Special Leave Petition and dismissed the appeal. The relevant observations made by the Apex Court on reproduction reads as under:-

"26. In spite of affording another opportunity to file better affidavit by placing adequate material, neither the Department nor the person-in-charge has filed any explanation for not applying the certified copy

within the prescribed period. The other dates mentioned in the affidavit which we have already extracted, clearly show that there was delay at every stage and except mentioning the dates of receipt of the file and the decision taken, there is no explanation as to why such delay had occasioned. Though it was stated by the Department that the delay was due to unavoidable circumstances and genuine difficulties, the fact remains that from day one the Department or the person/persons concerned have not evinced diligence in prosecuting the matter to this Court by taking appropriate steps.

27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bona fides, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot

take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody, including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.

30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay.

31. In view of our conclusion on Issue (a), there is no need to go into the merits of Issues (b) and (c). The question of law raised is left open to be decided in an appropriate case."

Apex Court in the case of State of Bihar and others v. Deo Kumar Singh and others; MANU/SC/1236/2019, declined to condone the delay and after observing as under, dismissed the appeal filed by the State of Bihar.

"1. The petitioner-State of Bihar filed an appeal against the order of the learned Single Judge before the Division Bench after a delay of 367 days. The Division Bench dismissed the application for condonation of delay on the ground that there was no sufficient cause shown for condonation of delay. It is thereafter with a delay of 728 days that the special leave petition has been filed. The reason given for seeking condonation of this extraordinary 728 days delay is as under: "2. that the petitioner State is filing the present special leave petition after obtaining all the sanctions from the respective departments and took time to receive the affidavit and vakalatnama from the concerned department, hence there is delay in filing the present matter."

2. We are of the view that a clear signal has to sent to the Government Authorities that they cannot approach the Court as and when they please, on account of gross incompetence of their officers and that too without taking any action against the

concerned officers. No detail of this delay of 728 days have been given as if there is an inherent right to seek condonation of delay by State Government. The law of limitation apparently does not apply to the State Government according to its conduct.

3. That such condonation of delay is no more admissible on the pretext of Government working lethargy is clear from the judgment of this court in *The Chief Post Master General v. Living Media India Ltd.* [MANU/SC/0132/2012 : (2012) 3 SCC 563].

4. We strongly deprecate the casual manner in which the Division Bench was approached and also this Court has been approached; the objective possibly being to get a certificate of dismissal from this Court. This is complete wastage of judicial time and the petitioners must pay for the same.

5. We, thus, dismiss the special leave petition on delay and impost cost on the petitioners of Rs. 20,000/- to be recovered from the officers responsible for this delay and be deposited with the Supreme Court Mediation Centre, within four weeks. Certificate of recovery be filed in this court.

6. We also direct the Chief Secretary of the State of Bihar to look into this matter to ensure better management of the legal cases.

7. Consequently, the special leave petition is dismissed in the aforesaid terms.

8. List before the Registrar, on reopening, to verify the certificate of recovery."

In the case of Prabhakar vs. Joint Director Sericulture Department and Ors. reported in MANU/SC/1041/2015 : AIR 2016 SC 2984, the Apex Court has observed that: "36. It is now a well recognised principle of jurisprudence that a right not exercised for a long time is non-existent. Even when there is no limitation period prescribed by any statute relating to certain proceedings, in such cases Courts have coined the doctrine of laches and delays as well as doctrine of acquiescence and non-suited the litigants who approached the Court belatedly without any justifiable explanation for bringing the action after unreasonable delay. Doctrine of laches is in fact an application of maxim of equity "delay defeats equities"."

In Basawaraj and Anr. vs. Special Land Acquisition Officer, reported at MANU/SC/0850/2013 : (2013) 14 SCC 81, the Supreme Court in paras 9 to 15 held that while dealing with an application seeking condonation of delay the Court must ensure that there is a sufficient cause, while condoning the delay. Relevant paras are reproduced below: "9. Sufficient cause is the cause for which Defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended

in the facts and circumstances existing in a case, duly examined from the view point of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the Court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the Court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See: Manindra Land and Building Corporation Ltd. v. Bhootnath Banerjee and Ors., MANU/SC/0259/1963 : AIR 1964 SC 1336; Lala Matadin v. A. Narayanan, MANU/SC/0621/1969 : AIR 1970 SC 1953; Parimal v. Veena @ Bharti, MANU/SC/0105/2011 : AIR 2011 SC 1150; and Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai, MANU/SC/0298/2012 : AIR 2012 SC 1629.)

10. In Arjun Singh v. Mohindra Kumar MANU/SC/0013/1963 : AIR 1964 SC 993 this Court explained the difference between a "good cause" and a

"sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of "sufficient cause".

11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but only so long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide: Madanlal v. Shyamlal, MANU/SC/0726/2001 : AIR 2002 SC 100; and Ram Nath Sao @ Ram Nath Sahu and Ors. v. Gobardhan Sao and Ors., MANU/SC/0135/2002 : AIR 2002 SC 1201.)

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the Court has no choice but to enforce it giving full effect to the same. The legal maxim "dura lex sed lex" which means "the law is hard but it is the law", stands

attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

13. The Statute of Limitation is founded on public policy, its aim being to secure peace in the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. It seeks to bury all acts of the past which have not been agitated unexplainably and have from lapse of time become stale. According to Halsbury's Laws of England, Vol. 24, p. 181: "605. Policy of Limitation Acts. The courts have expressed at least three differing reasons supporting the existence of statutes of limitations namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a Defendant might have lost the evidence to disprove a stale claim, and (3) that persons with good causes of actions should pursue them with reasonable diligence."....An unlimited limitation would lead to a sense of insecurity and uncertainty, and therefore, limitation prevents disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party's own inaction, negligence' or laches. (See: *Popat and Kotecha Property v. State Bank of India Staff Assn.*, MANU/SC/0516/2005 : (2005) 7 SCC 510; *Rajendar Singh and Ors. v. Santa Singh and Ors.*, MANU/SC/0342/1973 : AIR 1973 SC 2537; and *Pundlik Jalam Patil v. Executive Engineer, Jalgaon*

Medium Project, MANU/SC/4694/2008 : (2008) 17 SCC 448).

14. In *P. Ramachandra Rao v. State of Karnataka*, MANU/SC/0328/2002 : AIR 2002 SC 1856, this Court held that judicially engrafting principles of limitation amounts to legislating and would fly in the face of law laid down by the Constitution Bench in *A.R. Antulay v. R.S. Nayak*, MANU/SC/0326/1992 : AIR 1992 SC 1701

15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bonafide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature."

In Mewa Ram (deceased by LRs) & others Vs. State of Haryana MANU/SC/0344/1986 : AIR 1987 SC 45 wherein there was a delay of more than 3 years, which was not condoned and the landowners had felt satisfied with the compensation as awarded by High Court in that case. Another set of landowners had successfully approached the Apex Court and got enhanced compensation on the basis of which condonation of delay which was sought was declined.

Estate Officer, Haryana Urban Development Authority and Another Vs. Gopi Chand Atreja reported in MANU/SC/0355/2019 : AIR 2019 SC 1423, in which the lethargy on the part of the litigant cannot be so lightly dealt with. In that view of the matter, liberal view is not always to be construed. Here is a case in which there is no other explanation given except the lapse on the part of learned advocate and thereto, such has not been properly explained in the application. Looking to the averments contained in the application, the Court is not finding it satisfactory explanation to condone the delay of more than 4 years, which has taken place.

In case of Amalendu Kumar Bera & Ors. v. State of West Bengal, reported in MANU/SC/0298/2013 : (2013) 4 SCC 52. The observations made in Para. 10 are since relevant, the same are reproduced hereinafter: "10. In the instant case as noticed above,

admittedly earlier objection filed by the Respondent-State under Section 47 of the Code was dismissed on 17.8.2010. Instead of challenging the said order the Respondent-State after about one year filed another objection on 15.9.2011 under Section 47 of the Code which was finally rejected by the executing court. It was only after a writ of attachment was issued by the executing court the respondent preferred civil revision against the first order dated 17.8.2010 along with a petition for condonation of delay. Curiously enough in the application for condonation of delay no sufficient cause has been shown which entitle the respondent to get a favourable order for condonation of delay. True it is, that courts should always take liberal approach in the matter of condonation of delay, particularly when the appellant is the State but in a case where there is serious laches and negligence on the part of the State in challenging the decree passed in the suit and affirmed in appeal, the State cannot be allowed to wait to file objection under Section 47 till the decree holder puts the decree in execution. As noticed above, the decree passed in the year 1967 was in respect of declaration of title and permanent injunction restraining the Respondent-State from interfering with the possession of the suit property of the plaintiff-appellant. It is evident that when the State tried to interfere with possession the decree holder had no alternative but to levy the execution case for execution of the decree with regard to interference with possession. In our opinion their delay in filing the

execution case cannot be a ground to condone the delay in filing the revision against the order refusing to entertain objection under Section 47 CPC. This aspect of the matter has not been considered by the High Court while deciding petition for condoning the delay. Merely because the Respondent is the State, delay in filing the appeal or revision cannot and shall not be mechanically considered and in absence of 'sufficient cause' delay shall not be condoned.

Dilboo (Smt.) Dead by Lrs. and others v. Dhanraji (Smt.) Dead and others reported in MANU/SC/0564/2000 : (2000) 7 Supreme Court Cases 702 in which, Hon'ble Apex Court has analysed the Law of Limitation and then has opined, which observations contained in paragraph No. 20 since relevant, are reproduced in part hereinafter:-- "20.It is always for the party who files the Suit to show that the Suit is within time. Thus in cases where the Suit is filed beyond the period of 12 years, the plaintiff would have to aver and then prove that the Suit is within 12 years of his/her knowledge. In the absence of any averment or proof, to show that the Suit is within time, it is the plaintiff who would fall. Whenever a document is registered the date of registration becomes the date of deemed knowledge. In other cases where a fact could be discovered by due diligence then deemed knowledge would be attributed to the plaintiff because a party cannot be allowed to extend period of

limitation by merely claiming that he had no knowledge."

In a judgment reported at MANU/SC/0042/1961 : (1962) 2 SCR 762 Ramlal & Chhotelal v. Rewa Coalfields Ltd., the Supreme Court has held that in showing sufficient cause to condone the delay, it may not be necessary that the applicant has to explain the whole of the period between the date of the judgment till the date of filing the appeal. It would be sufficient that the applicant has to explain the delay caused by the period between the last of the dates of limitation and the date on which the application/appeal is actually filed.

In MANU/SC/0335/1968 : (1969) 1 SCR 1006 Shakuntla Devi Jain v. Kuntal Kumari & Ors., a three Judge Bench of the Supreme Court had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

POWER OF REVIEW

In Thungabhadra Industries Ltd. v. Govt. of A.P. MANU/SC/0217/1963 : (1964) 5 SCR 174, another three-Judge Bench reiterated that the power of review is not analogous to the appellate power and observed: A review is by no means an appeal in disguise whereby

an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out.

In Aribam Tuleshwar Sharma v. Aibam Pishak Sharma MANU/SC/0004/1979 : (1979) 4 SCC 389,

this Court answered in affirmative the question whether the High Court can review an order passed under Article 226 of the Constitution and proceeded to observe: But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court

to correct all manner of errors committed by the subordinate court.

In Meera Bhanja v. Nirmala Kumari Choudhury

MANU/SC/0098/1995 : (1995) 1 SCC 170, the

Court considered as to what can be characterised as an error apparent on the face of the record and observed: ... it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

Court in the case of **Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale**

MANU/SC/0169/1959 : AIR 1960 SC 137 wherein,

K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record: An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ.

In Parsion Devi v. Sumitri Devi
MANU/SC/1360/1997 : (1997) 8 SCC 715, the

Court observed: An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 Code of Civil Procedure.... A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

In Lily Thomas v. Union of India
MANU/SC/0327/2000 : (2000) 6 SCC 224, R.P.

Sethi, J., who concurred with S. Saghir Ahmad, J., summarised the scope of the power of review in the following words: Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised.

In Haridas Das v. Usha Rani Banik
MANU/SC/8039/2006 : (2006) 4 SCC 78, the Court

observed: The parameters are prescribed in Order 47

Code of Civil Procedure and for the purposes of this lis, permit the Defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict.

In State of West Bengal v. Kamal Sengupta MANU/SC/3011/2008 : (2008) 8 SCC 612, the Court considered the question whether a Tribunal established under the Administrative Tribunals Act, 1985 can review its decision, referred to Section 22(3) of that Act, some of the judicial precedents and observed: At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review *ex debito justitiae*. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and

even after the exercise of due diligence, the same could not be produced before the court earlier. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 Code of Civil Procedure or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment / decision.

DOCTRINE OF BINDING PRECEDENT

Supreme Court in the case of Mahadeolal Kanodia Vs. Administrator General of W.B. reported in MANU/SC/0294/1960 : AIR 1960 SC 936, held as under: 19....If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High

Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another Single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court.

In Lala Shri Bhagwan Vs. Ram Chand reported in MANU/SC/0320/1965 : AIR 1965 SC 1767, the Apex Court observed as under: 18....It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy

principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself.

The Supreme Court in the case of Union of India Vs. Raghubir Singh reported in MANU/SC/0619 /1989 : (1989) 2 SCC 754, while recognizing the need for constant development of law and jurisprudence, emphasized the necessity of abiding by the earlier precedents in the following words: 9. The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

In the case of Sundrajas Kanyalal Bhatija VS. Collector, Thane reported in MANU/SC/0040 /1990 : (1989) 3 SCC 396, a two-Judge Bench of the Apex Court observed as under: 22.... In our system of judicial review which is a part of our constitutional scheme, we hold it to be the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to

behaviour. It must be determined with reasons which carry convictions within the courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Sub-ordinate courts would find themselves in an embarrassing position to choose between the conflicting opinion. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute.

In the case of Vijay Laxmi Sadho (DR.) Vs. Jagdish, reported in MANU/SC/1463/2001 : (2001) 2 SCC 247, the Apex Court considered whether the learned Single Judge of Madhya Pradesh High Court could ignore the judgment of a coordinate Bench on the same issue and held as under: 33. As the learned Single Judge was not in agreement with the view expressed in Devilal case it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. It is well-settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of different arguments or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms

the basis of judicial procedure and it must be respected at all costs.

In the case of Pradip Chandra Parija Vs. Pramod Chandra Patnaik, reported in MANU/SC/0304 /2002 : (2002) 1 SCC 1, the Constitution Bench of the Apex Court noted that the two learned Judges denuded the correctness of an earlier Constitution Bench judgment in *Bharat Petroleum Corpn. Ltd., vs. Mumbai Shramik Sangha* and reiterated the same despite the fact that the second Constitution Bench refused to reconsider the earlier verdict and observed as under:

3. We may point out, at the outset, that in *Bharat Petroleum Corpn. Ltd., vs. Mumbai Shramik Sangha* a Bench of five Judges considered a somewhat similar question. Two learned Judges in that case doubted the correctness of the scope attributed to a certain provision in an earlier Constitution Bench judgment and, accordingly, referred the matter before them directly to a Constitution Bench. The Constitution Bench that then heard the matter took the view that the decision of a Constitution Bench binds a Bench of two learned Judges and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, the Bench of two learned Judges could have ordered that the matter be heard by a Bench of three learned Judges.

5. The learned Attorney-General submitted that a Constitution Bench judgment of this Court was

binding on smaller Benches and a judgment of three learned Judges was binding on Benches of two learned Judges—a proposition that learned counsel for the appellants did not dispute. The learned Attorney-General drew our attention to the judgment of a Constitution Bench in *Sub-Committee of Judicial Accountability vs. Union of India* where it has been said that 'no coordinate Bench of this Court can even comment upon, let alone sit in judgment over, the discretion exercised or judgment rendered in a cause or matter before another coordinate Bench'. The learned Attorney-General submitted that the appropriate course for the Bench of two learned Judges to have adopted, if it felt so strongly that the judgment in *Nityananda Kar* was incorrect, was to make a reference to a Bench of three learned Judges. That Bench of three learned Judges, if it also took the same view of *Nityananda Kar*, could have referred the case to a Bench of five learned Judges.

6. In the present case the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five Judges. In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to

a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified.

In the case of State of Bihar Vs. Kalika Kuer reported in MANU/SC/0346/2003 : (2003) 5 SCC 448, the Apex Court elaborately considered the principle of per incuriam and held that the earlier judgment by a larger Bench cannot be ignored by invoking the principle of per incuriam and the only course open to the coordinate or smaller Bench is to make a request for reference to the larger Bench.

In the case of State of Punjab V. Devans Modern Breweries Ltd., reported in MANU/SC/0961/2003 : (2004) 11 SCC 26, the Apex Court reiterated that, if a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter has to be referred to a larger Bench.

In the case of Central Board of Dawoodi Bohra Community VS. State of Maharashtra reported in MANU/SC/1069/2004 : (2005) 2 SCC 673, the Constitution Bench of the Apex Court interpreted Article 141, referred to various earlier judgments including Bharat Petroleum Corpn. Ltd., vs. Mumbai

Shramik Sangha, and Pradip Chandra Parija vs. Pramod Chandra Patnaik and others and has held as under: the law laid down in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength and it would be inappropriate if a Division Bench of two Judges starts overruling the decisions of Division Benches of three Judges. The Court further held that such a practice would be detrimental not only to the rule of discipline and the doctrine of binding precedents but it will also lead to inconsistency in decisions on the point of law; consistency and certainty in the development of law and its contemporary status-both would be immediate casualty.

In the case of State of U.P. VS. Jeet S. Bishat reported in MANU/SC/7702/2007 : (2007) 6 SCC 586, when one of the Hon'ble Judges (Katju, J.) constituting the Bench criticized the orders passed by various Benches in the same case, the other Hon'ble Judge (Sinha, J.) expressed himself in the following words: 100. For the views been taken herein, I regret to express my inability to agree with Brother Katju, J. in regard to the criticisms of various orders passed in this case itself by other Benches. I am of the opinion that it is wholly inappropriate to do so. One Bench of this Court, it is trite, does not sit in appeal over the other Bench particularly when it is a coordinate Bench. It is equally inappropriate for us to express total disagreement in the same matter as also in

similar matters with the directions and observations made by the larger Bench. Doctrine of judicial restraint, in my opinion, applies even in this realm. We should not forget other doctrines which are equally developed viz. Judicial Discipline and respect for the Brother Judges.

In the case of U.P. Gram Panchayat Adhikari Sangh VS. Data Ram Saroj reported in MANU/SC/8775 /2006 : (2007) 2 SCC 138, the Apex Court noted that by ignoring the earlier decision of a coordinate Bench, a Division Bench of the High Court directed that part-time tube-well operators should be treated as permanent employees with same service conditions as far as possible and observed thus: 26. Judicial discipline is self-discipline. It is an inbuilt mechanism in the system itself. Judicial discipline demands that when the decision of a coordinate Bench of the same High Court is brought to the notice of the Bench, it is to be respected and is binding, subject of course, to the right to take a different view or to doubt the correctness of the decision and the permissible course then open is to refer the question or the case to a larger Bench. This is the minimum discipline and decorum to be maintained by judicial fraternity.

Apex Court in the case of Coir Board VS. Indira Devi P.S. reported in MANU/SC/0186/1998 : (1998) 3 SCC 259, a two-Judges Bench doubted the correctness of the seven-Judges Bench judgment in

Bangalore Water Supply & Sewerage Board vs. A. Rajappa and directed the matter to be placed before Hon'ble the Chief Justice of India for constituting a larger Bench. However, a three-Judges Bench headed by Dr. A.S. Anand, C.J., refused to entertain the reference and observed that the two-Judge Bench is bound by the judgment of the larger Bench

Apex Court in the case of official Liquidator Vs. Dayanand And Others reported in MANU/SC/4591 /2008 : (2008) 10 SCC 1, has observed as under:

90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as

to which of the judgments lay down the correct law and which one should be followed.

91. We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judge Bench in *UP Seb Vs. Pooran Chandra Pandey* should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other judicial foras nor they should be relied upon or made basis for

bypassing the principles laid down by the Constitution Bench.

NOMINEE OF ACCOUNT HAS RIGHT TO RECIEVE MONEY BUT DOES NOT MAKE HIM OWNER - IT DEVOLVES AS PER PERSONAL LAW

Ram Chander Talwar and Ors. vs. Devender Kumar Talwar and Ors. 2010 (10) SCC 671, MANU/SC/0833/2010 Section 45ZA(2) Banking Regulation Act, merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of Section 45ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.